Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1147

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v.

S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, AND ALEX FULLER, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, AND ALEX FULLER, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that this Court issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 16, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is set forth at p. 3a of the Appendix hereto. The Sixth Circuit has directed that its opinion not be reported.

The Sixth Circuit affirmed Orders of the United States District Court for the Eastern District of Michigan entered December 12, 1975 (Appendix, p. 19a) and June 17, 1976 (Appendix, p. 7a) ruling respectively that Petitioner could not intervene or bring a separate action to assert that two earlier Orders of the Court were invalid and were not binding upon Petitioner. Those two earlier Orders, entered July 29, 1974, and July 28, 1975, are set forth in the Appendix at p. 27a and p. 24a respectively.

JURISDICTION

The Judgment of the Court of Appeals was entered November 16, 1977. Notice of the entry of Judgment, pursuant to Rule 36 of the Federal Rules of Appellate Procedure, is set forth in the Appendix, at p. 1a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does mandatory pregnancy leave violate Title VII of the Civil Rights Act of 1964?

2. Does Title VII require a state to pay unemployment compensation to women on mandatory pregnancy leave:

a. Is a state's unemployment compensation program subject to Title VII?

b. Do the Supremacy Clause and the doctrine under it of *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), require a state, despite a state statute specifying that

persons on leave are not to be considered unemployed, to pay unemployment compensation to women on mandatory pregnancy leave?

3. May a non-party to the proceeding in which a consent order was entered be barred, on the ground that it was not timely in moving to intervene, from bringing a separate action to establish that the consent order may not determine its legal rights?

4. Are the Due Process rights of an employer violated where its assessments to a state unemployment compensation fund will be increased, contrary to the state statute, on the basis of a consent order issued in a proceeding in which its rights were not represented and where it is barred from bringing a separate action to establish that the consent order cannot adversely determine its rights?

5. Should the decision below be reversed as a clear violation of (i) the specific requirements for bringing an action under Title VII, (ii) the established criteria for the grant of summary judgment under F.R. Civ. Pro. 56, and (iii) the requirements of Article III of the Constitution?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution of the United States:

Article III, Section 2.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . .

Article VI, second paragraph.

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any

Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XIV, Section 1.

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

Statutes of the United States:

Title VII of the Civil Rights Act of 1964.
42 U.S.C. §2000e-2(a)

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. §2000e-5(f)(1)

. . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, . . . the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought . . . by the person claiming to be aggrieved.

Statutes of the State of Michigan:

Section 48 of the Michigan Employment Security Act, Mich. Comp. Laws §17.552.

. . . An individual shall not be deemed to be unemployed during any leave of absence from work granted by an employer either at the request of the individual or pursuant to an agreement with his duly authorized bargaining agent, or in accordance with law.

Regulatory Provisions

Guidelines of the United States Equal Employment Opportunity Commission.

29 C.F.R. §1604.10(b)

Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Federal Rules of Civil Procedure.

Rule 56(c)

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law.

STATEMENT OF THE CASE

Petitioner operates factories and other facilities in the State of Michigan. Over the period 1967-1970, Petitioner introduced mandatory pregnancy leave for a specified period before and after delivery date — with respect to some of its employees at the request of Respondent UAW as a provision in their collective bargaining agreements, and for other workers as a unilateral policy.

The Civil Rights Act of 1964 became effective on July 2, 1965. The General Counsel of the United States Equal Employment Opportunity Commission issued informal opinions that Title VII of the Act did not require employers to treat pregnancy as if it were an illness. Nevertheless, in 1972, the EEOC issued Guidelines declaring that pregnancy must be treated as an illness under Title VII, 29 CFR §1604.10. These Guidelines have been declared by this Court in part to be inconsistent with Title VII (*General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)) and in part to be validly issued (*Nashville Gas Co. v. Satty*, 46 U.S.L.W. 4026 (December 6, 1977)).

After the Guidelines were issued, in 1972 and 1973, Petitioner changed its policy and negotiated amendments in its collective bargaining agreements in order to eliminate the mandatory pregnancy leave provisions and thus conform to the Guidelines.

Section 48 of the Michigan Employment Security Act (MESA) provides that unemployment compensation is not to be paid to workers on leave for any of a number of sexually neutral reasons.

On July 16, 1973, Respondent UAW and certain individual employee-claimants (collectively, Claimants) filed suit in Federal District Court against the members and the Director of the Michigan Employment Security Commission and other persons who administer the unemployment compensation program (the State). The suit sought declaratory and injunctive relief precluding the application of Section 48 to employees on mandatory pregnancy leave and requiring the State to pay unemployment compensation to women on such leave.[1] This suit has come to be known in these proceedings as *UAW v. Taylor*.

The Complaint alleged, invoking the Court's Federal question jurisdiction, that the State's denial of benefits to these employees violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the Federal unemployment laws, and Title VII of the Civil Rights Act of 1964. No employer was joined in the suit.

The State moved that the Complaint be dismissed because the Claimants had failed to join as defendants any employers and because such employers are indispensable parties under Fed. R. Civ. Pro. 19(a). This motion was never ruled upon. The State undertook no further defense of the case: it never answered the Complaint; it never filed a motion directed at the merits of the Complaint; it never filed a response to Claimants' motion for Partial Summary Judgment. Instead, the State agreed to the entry by the Court, on July 29, 1974, of an Order requiring the State to pay unemployment benefits to employees on mandatory

---

[1] Earlier, the Circuit Court of Wayne County, Michigan, had declared that Section 28 of the MESA, which unlike Section 48 applies specifically to women out of work due to pregnancy and provides that no unemployment compensation be paid to them for a specified period before and after delivery, is unconstitutional. *Goodman v. Chrysler*, 6 CCH Un. Ins. Repr. ¶9341 (Wayne Cir. Michigan No. 208-538, February 6, 1973). An employer was a party to that litigation.

pregnancy leave. This Order is known as the Consent Order.[2]

The Consent Order decreed that the State's denial, pursuant to MESA Section 48, of benefits to pregnant women on mandatory pregnancy leave was "contrary to Federal law," and it enjoined the State to pay "unemployment" benefits to these women. The Order did not explain how "Federal law" compelled its result. Indeed, it did not even specify which particular provision of "Federal law" was contravened by Section 48 — resting instead on its power to be silent.

The Consent Order required the MESC to "reopen, rehear and reconsider" claims of women on mandatory pregnancy leave which were denied from and after April 5, 1972. Since Petitioner had terminated mandatory pregnancy leave after the EEOC Guidelines became effective on that date, the Consent Order, by its terms, would not have significantly affected it. The Consent Order further stipulated that it did "not prejudice the rights or alleged rights of any employee-claimant who was denied MESA benefits between June 30, 1965 and April 5, 1972." It did not appear to determine whether such employees in fact had any rights, and the State interpreted it to require the payment of benefits only to women placed on leave after April 5, 1972.

[2]The State and the Claimants used this procedure even though a state court had only a few months before warned them that it was improper. The State and the UAW had agreed that another provision of MESA was unconstitutional, and asked the court to give judicial blessing to that agreement. The Michigan Court of Appeals refused to do so, because it recognized that it would "not be deciding a question but rather, merely obliging the litigants" without having before it "briefs and arguments on both sides of the controversy." Courts, it stressed, do not "enter decrees striking down acts of the legislature on the strength of stipulations signed by agreeable litigants." *Rozankovich v. Kalamazoo Spring Corp.*, 44 Mich. App. 426, 205 N.W.2d 311 (January 18, 1973). The District Court below did not observe this precept.

On July 28, 1975, however, the District Court entered another order upon the motion of certain Michigan civil service employees, specifying that the Consent Order required the payment of benefits to all claimants placed on leave after June 30, 1965. No employer (other than the State) was a party to the action even then. The effect of this Order was to expand the coverage of the Consent Order to include employees on leave over an additional seven-year period, thus substantially broadening its impact. It was not merely a matter of making seven additional years subject to the Order. During that period, Petitioner (and no doubt other employers) had maintained at the request of Respondent UAW a mandatory pregnancy leave policy in the belief, confirmed by the informal opinions of the EEOC General Counsel concerning pregnancy distinctions in employment and pregnancy leave in particular, that such a policy was entirely proper under Title VII, indeed, that pregnancy leave was required by Title VII. See, *e.g.*, EEOC General Counsel's letter of October 17, 1966, CCH Employment Practices Guide ¶17,304-43 (1970); EEOC Decision of December 16, 1969, CCH EEOC Decisions ¶6084 (1973).

Employment compensation in Michigan is funded from assessments paid by employers. An employer's assessments are substantially affected by the amount of benefits the State pays to that employer's workers. Because of the large number of workers placed on mandatory pregnancy leave between 1965 and 1972, Petitioner's assessments to the unemployment compensation fund will be substantially increased by the District Court's Orders, even though those Orders are incorrect and neither Petitioner nor any employer participated in the case.

On November 14, 1975, Petitioner, as well as General Motors Corporation, moved for leave to intervene in *UAW v. Taylor* for the purpose of dissolving the Orders of the

District Court and reopening the case to provide for the first time an adversarial presentation of the issues.

On December 12, 1975, the District Court denied these motions. The District Court held that Petitioner's motion to intervene should be denied on three grounds: Petitioner had actual notice of the suit and of the Court's orders; Petitioner was not "an indispensable or necessary party" to the case; and "intervention would not change the outcome" of the suit. With regard to this last proposition, the District Court observed that "[i]n light of *Turner v. Department of Employment Security & Board of Review of the Industrial Commission of Utah*, 44 U.S.L.W. 3298 (11/18/75) [423 U.S. 44], the court is convinced of the correctness of its prior orders in this case."

On March 31, 1976, Petitioner filed suit in the United States District Court for the Eastern District of Michigan against the MESC (and its members and its director) and against the UAW. The District Court had Federal question and diversity jurisdiction, as well as pendent jurisdiction. This suit is known as *Firestone v. Taylor*. Petitioner sought declaratory, injunctive, and other relief designed to prevent the Consent Order of July 29, 1974, as expanded by the Order of July 28, 1975, from applying to it and to have its rating account adjusted so that its assessments to the unemployment compensation fund would not be increased by benefits paid to its employees pursuant to those Orders.

By this Complaint (Appendix, p.9a), Petitioner alleged that:

1. The Orders were beyond the jurisdiction of the District Court to enter:

a. A single judge of the District Court had enjoined operation of a State statute as being violative of the U.S.

Constitution, contrary to the requirements of 28 U.S.C. §2281 (1970 ed.).[3]

The District Court's only explanation of the legal basis of its Order of July 29, 1974, was its citation (in its Order of December 12, 1975, denying Petitioner's motion to intervene) of *Turner v. Department of Employment Security*, 423 U.S. 44 (1975). Since *Turner* was decided solely under the United States Constitution, the District Court's explanation implied that it had enjoined application of MESA Section 48 on the ground that it violated the Constitution — an injunction then beyond the power of a single judge.[4]

b. There was no case or controversy within the meaning of Article III of the United States Constitution.

2. Even if the District Court had jurisdiction to enter the Consent Order, Petitioner's Complaint continued, the Order should be nullified because it erroneously interpreted and applied Federal law (for the reasons discussed in this Petition).

3. The Complaint further alleged that the State had breached its fiduciary duties to Petitioner and violated Petitioner's Constitutional rights by agreeing to the Consent Order and applying that Order to Petitioner.

The District Court dismissed Petitioner's Complaint by Order entered June 17, 1976, on the ground that the Consent Order "is *stare decisis* upon the Complaint herein, and . . . is correct on the merits."

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[3]This statute was repealed on August 12, 1976, 90 Stat. 1119. That repeal did not affect cases brought before then.

[4]Petitioner also alleged that even if *UAW v. Taylor* could have been lawfully decided under the Constitution, the State's determination not to pay unemployment compenstation to workers on leave, including pregnant women, does not violate the Constitution. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

By consolidated appeals, Petitioner appealed to the United States Court of Appeals for the Sixth Circuit (i) the Order of December 12, 1975, denying its motion to intervene in *UAW v. Taylor* and (ii) the Order of June 17, 1976, granting summary judgment to Respondents and dismissing Petitioner's Complaint in *Firestone v. Taylor.*

By decision entered November 16, 1977, the Court of Appeals affirmed the District Court's Orders. It held that Petitioner's motion to intervene had not been timely filed. It also held that the Consent Order in *UAW v. Taylor* had been correctly decided under Title VII and that Petitioner had no right to bring a separate action to challenge the applicability of the Consent Order to it.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES IMPORTANT NEW ISSUES ABOUT THE INTERPRETATION AND SCOPE OF TITLE VII AND THE SUPREMACY CLAUSE.

The decision below rested on a finding that Title VII had been violated. The applicability of Title VII involves two possible analytical routes. Since neither the Sixth Circuit nor the District Court explained its decision, it is not clear which line the Sixth Circuit adopted. Each analytical approach raises substantial and important Federal questions concerning the interpretation, application and enforcement of Title VII. One approach, moreover, involves novel and important questions as to the scope and meaning of the Supremacy Clause of the Constitution.

A. A Holding that the State's Denial of Benefits Directly Violates Title VII Raises Important Issues This Court Should Consider.

The first explanation for the decision below is that the Sixth Circuit held that Title VII applies to payments of

social benefits by a state and invalidates the application of MESA Section 48 to women on mandatory pregnancy leave. Any such holding in this case must rest on two primary conclusions: that Title VII applies to state social welfare programs and that Title VII makes the application of Section 48 to those on pregnancy leave unlawful. These conclusions rest on novel, but unsound, interpretations of Title VII that warrant this Court's consideration.

1. This Court Should Consider the Conflict Between the Circuits as to Whether Title VII Applies to the Payment of Social Benefits by a State.

Title VII sweeps broadly by covering virtually all employer-employee relations. But Title VII has its limits: it only applies to employment practices of employers, employment agencies, and labor organizations. 42 U.S.C. §2000e-2.

Title VII does not apply to the payment of social benefits by a state. Even where the social benefits have some connection to an employment relationship, as with the payment of unemployment benefits, Title VII does not apply. There is nothing in Title VII which speaks to the acts of a state in its capacity as the administrator of social welfare programs.

To our knowledge, the only other Circuit to consider whether Title VII applies to the state's activities in distributing social benefits is the Fifth Circuit. That Circuit held explicitly that Title VII does not apply to state benefit programs, *Vick v. Texas Employment Commission,* 514 F.2d 734, *reh. denied,* 520 F.2d 944 (5th Cir. 1975). The Sixth Circuit in the decision below apparently reached a result directly contrary to that of the Fifth Circuit. Such a decision would be incorrect and in sharp conflict with the only other Circuit that has considered the issue. This issue raises important questions as to the scope of Title VII, not

only with regard to pregnancy but to all employment-related benefit programs.

2. A Decision of the Court Below that the Non-payment of Benefits to Women on Pregnancy Leave Violates Title VII is Contrary to this Court's Recent Decisions.

A decision below that the denial of unemployment compensation to women on pregnancy leave, pursuant to MESA Section 48, violates Title VII is contrary to this Court's recent construction of that statute in *Gilbert* and *Satty, supra.*

In *Gilbert* this Court held that the exclusion of pregnancy-related disabilities from a benefit program does not violate Title VII where the pregnancy exclusion is based on the fact of pregnancy and not on classification by gender, where there is no showing that the pregnancy exclusion is but a pretext for effecting invidious discrimination, and where there is no showing of sex-based discriminatory effects in the overall program. In the words of the Court, "gender-based discrimination does not result simply because an employer's disability benefits plan is less than all-inclusive." 429 U.S. at 138-139.

MESA Section 48 defines who is unemployed for purposes of obtaining jobless benefits by excluding persons on leave. It is a provision which is facially neutral; it does not include the word "pregnancy" or any gender-based words. It is a provision which is facially reasonable: to limit unemployment benefits to persons who have lost their jobs and are not merely on leave. This limitation makes economic sense by limiting the cost of what is in any event an expensive, employer-funded program. It is a provision at least as reasonable as that upheld in *Geduldig v. Aiello*, 417 U.S. 484 (1974), and in *Gilbert* (which placed considerable reliance on the *Geduldig* holding).

Satty reaffirmed *Gilbert* with respect to the validity of pregnancy exclusions from employee benefit programs. While the Court upheld Mrs. Satty's attack on her former employer's policy for determining seniority after she returned from pregnancy leave, it rejected her *Gilbert*-like claim that the employer's refusal to award sick-leave pay for pregnancy absences violated Title VII. *Satty* makes clear that a plaintiff can successfully attack an exclusion of pregnancy from a benefit package only if she demonstrates that the exclusion is a "mere pretext designed to effect an invidious discrimination against the members of one sex or the other." 46 U.S.L.W. at 4028.

MESA Section 48, however, is facially neutral. There is no evidence (or even an allegation) that its general denial of benefits to employees on leave is a "mere pretext" for invidious discrimination against women. In the terms of the Court's rejection of the seniority provision at issue in *Satty*, the payment of unemployment benefits is most certainly a "benefit" and not in any way the sort of "burden" which the Court there rejected.[5]

The decision of the Court below, if based on a determination that the non-payment of benefits to pregnant women violates Title VII, is in direct conflict with this Court's decisions in *Gilbert* and *Satty*.

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[5]In its brief *amicus curiae* filed with this Court in *Satty* jointly with the AFL-CIO, the UAW observed that the employer's seniority provision "affects the employment relationship permanently and fundamentally, rather than temporarily and tangentially." The UAW contrasted this with "the actuarial risk analysis underlying *Gilbert* and *Geduldig*." UAW Brief, p. 23. The State's refusal to pay unemployment benefits here is like the matters at issue in *Gilbert* and *Geduldig* and in the sick-pay portion of *Satty* and is not, in the UAW's terms, anything that "affects the employment relationship permanently and fundamentally."

B. A Holding that MESA Section 48 Is Preempted by Title VII Raises Similar Important Issues This Court Should Consider.

If the decision below does not rest on a holding that the application of MESA Section 48 directly violates Title VII, it must rest on the view that the application of Section 48 somehow impedes Title VII and thus is preempted by it. Such a holding would rest on two critical premises: mandatory pregnancy leave violates Title VII, and such a violation by the employer requires as a matter of Federal law preemption of MESA Section 48.

1. This Court Should Consider Whether, in light of *Gilbert* and *Satty*, Mandatory Pregnancy Leave Violates Title VII.

Gilbert and *Satty* leave open the substantial Federal question of whether a requirement that a pregnant employee take leave for a specified period shortly before and shortly after giving birth violates Title VII. That issue is squarely posed by the present case. While the issue has not been decided by this Court, the Sixth Circuit's apparent view that such leave is a violation would seem to conflict with the Court's analysis of Title VII pregnancy issues in *Gilbert* and *Satty*.

Gilbert upheld the validity under Title VII of pregnancy exclusions from benefit programs (at least where the exclusion was not a pretext for invidious discrimination) and *Satty* reaffirmed this holding. On the other hand, *Satty* also held that an employer's policy which strips a woman of seniority after pregnancy leave violates Title VII.

Satty distinguished the seniority provision from the legitimate nonpayment of benefits on three grounds. First, it distinguished between a "benefit" such as the disability program and a "burden" such as the loss of seniority. Second, it examined whether there was a proper business

justification for the employer's policy. Third, it found that while the portion of the EEOC's 1972 pregnancy Guidelines that applies to benefit exclusions was inconsistent with prior agency interpretations of the statute, that portion of the Guidelines that applies to the seniority issue was not.

It is not clear after *Satty* and *Gilbert* where the mandatory pregnancy leave issue lies. Is not such a leave a "benefit" (by preserving the women's job) rather than a "burden"? Even if it is a burden, is not it a permissible burden, particularly where there is sufficient business justification?[6]

Moreover, are the EEOC Guidelines, as applied to pregnancy leave, entitled to weight in light of the *Gilbert* and *Satty* analyses? Before it issued the Guidelines, the EEOC *required* employers to provide employees with pregnancy leave. CCH EEOC Decisions (1973 ed.) ¶6084 (EEOC Decision of December 16, 1969). If an employer was required to provide pregnancy leave, could he not for purposes of uniform and fair application and business planning provide that the leave must run for a certain specified period?

Thus, it appears from *Gilbert* and *Satty* and otherwise that mandatory pregnancy leave does not violate Title VII.[7]

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[6] In *Satty*, this Court said:

> "If a company's business necessitates the adoption of particular leave policies, Title VII does not prohibit the company to apply these policies to all leaves of absence, including pregnancy leaves; Title VII is not violated even though the policy may burden female employees."
>
> 46 U.S.L.W. at 4028

[7] Justice Stevens' concurrence in *Satty* suggests that *Gilbert* and *Satty* together hold that Title VII makes unlawful an employer's pregnancy-related policy only if that policy is one "which adversely affects a woman beyond the term of her pregnancy leave." 46 U.S.L.W. at 4031. The UAW suggested, as noted above at p. 15, just such an approach in its *amicus* brief in the *Satty* case. This test would sustain the validity of mandatory pregnancy leave, which is but a temporary interruption of employment.

But this important question has not been directly addressed by this Court, and the opinion below is a clear demonstration of the need for the Court to clarify the legality of mandatory pregnancy leave.

2. This Court Should Review the Extent to which the Decision Below Expands the Supremacy Clause Through an Extension of the *Nash* Doctrine.

The Claimants who brought *UAW v. Taylor* never sued any employer or made any claim against any employer. However, the claimants sought to apply Title VII by arguing that under *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), they had a valid cause of action against the State because the State's enforcement of MESA Section 48 impeded the enforcement of Title VII against miscreant private employers. The Court below apparently accepted this view — it is the only way (if *Vick* was followed) by which Title VII could be applicable to this case.

To reach this decision, the Court below had to conclude that Petitioner's mandatory pregnancy leave violated Title VII — a conclusion that, as *Gilbert* and *Satty* demonstrate, is not free from doubt. The Court had further to conclude that states are prohibited by the Supremacy Clause of the Federal Constitution from applying sexually neutral provisions delimiting the scope of their unemployment compensation programs to women whose Title VII rights have been violated by an employer — but must instead give those women special affirmative treatment in violation of state law. The decision of the Court below in effect requires the state to "make it up" to women whose employers violate Title VII, even if the "make up" is contrary to state law. The decision requires a state to exceed the parameters of its social benefit programs in order to provide assistance to ineligible persons whose Federally protected rights are

deemed to have been violated, not by the state, but by a private employer.

This approach extends *Nash* beyond all reasonable proportions and would interject Federal law farther into state matters than the Framers ever intended or this Court has ever permitted. To the extent the decision below was based on this analysis, it raises novel issues of major importance that require this Court's consideration.

By its terms, *Nash* was a straightforward Supremacy Clause case in the tradition of *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). But this case is far removed from the circumstances that faced this Court in *Nash*. Mrs. Nash lost state benefits to which she was otherwise entitled solely because she filed a Federal claim. The Court held that the State "should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan." 389 U.S. at 239. But the State's enforcement of MESA Section 48 to deny unemployment compensation to women on pregnancy leave in no way impeded the ability of those women to pursue their rights to file claims under Title VII; the denial of employment compensation to women on pregnancy leave had nothing to do with any attempt by them to exercise their Federal rights and did not impede their ability to pursue any Title VII claims against their employers. Unlike the Florida action against Mrs. Nash, the present case presents no coercive tie between the exercise of Federal rights and the eligibility for State benefits.

Nor does the denial of unemployment compensation encourage employers to violate Title VII (assuming *arguendo* that mandatory pregnancy leave violates the Act). Employers will be far more deterred by the risk of back-pay actions by employees wrongly put on leave than they will be encouraged to put them on leave by the fact that unem-

ployment compensation benefits will not then be paid. This is best demonstrated by the facts of this case: Petitioner ended its mandatory pregnancy leave policy after the EEOC Guidelines were promulgated, even though at that time the State would not have paid unemployment compensation to any women Petitioner placed on leave.

The Court below's extension of *Nash*, moreover, directly contravenes the explicit holdings of this Court that a state law will not be set aside unless the "subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); see also *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974).

If *Nash* applies to the circumstances presented by this case, it will have been drastically extended, and the floodgates will have been opened to Federal cases challenging all manner of otherwise lawful state actions. Under the view of *Nash* taken below, a Federal Court should require a state to disregard the standards of its laws as necessary to enhance Federally created rights even if the state statute itself does not violate or impede Federal law. Pursuant to this analysis, the Supremacy Clause would judge a state statute not by whether it contravenes or impedes Federal law, but whether it carries out the presumed will of the central government. In short, the Supremacy Clause would require state law to assist and promote Federal law and the policies of the Federal Government. The implications of this holding are critically important to the future of Federalism.

II. THE HOLDING OF THE COURT PRECLUDING PETITIONER FROM BRINGING AN ACTION TO ESTABLISH THAT THE CONSENT ORDER IS NOT BINDING UPON IT IS ERRONEOUS.

The Court below held that because Petitioner did not timely intervene in *UAW v. Taylor*, it had no "clear right"[8] to bring a separate action to obtain a declaration and other relief establishing that it is not bound by the Consent Order, entered in a case to which it was not a party.

It is well established that a decree entered in a case in which a person is not a party cannot legally determine his legal rights. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 65 (5th Cir. 1974), *vacated on other grounds*, 431 U.S. 395 (1977) (consent decree); *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201 (2d Cir. 1972).

Where a consent order adversely affects a non-party, he can take one of two courses: he can wait until the order is applied to him to challenge its application or he can bring a separate action to prevent that application. In this case, the latter course appeared more expeditious, since the application to Petitioner of the Consent Order is indirect, consisting of accounting entries made by the State followed at some indefinite time (depending on a number of other factors) by increased assessments to the unemployment compensation fund.

But the Court below ruled that Petitioner could not bring such an action because it had not timely intervened in *UAW v. Taylor*. In effect, therefore, it determined that a person must intervene in a case to avoid it adversely af-

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[8]Since the Court below affirmed dismissal of Petitioner's Complaint upon summary judgment, it apparently concluded that Petitioner did not have even an unclear right to bring it.

fecting his legal rights. This is directly contrary to the rule that a decree may not determine the legal rights of a person who is not a party. The ruling of the Court below would totally nullify the rule and prevent the non-party from having his day in court.

III. THIS ENTIRE PROCEEDING HAS DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AND HAS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

In three separate respects, the decision of the Court below has so departed from the accepted course of judicial proceedings, and sanctioned such a departure by the District Court, that this Court should grant the Petition and reverse the decision of the Court below.

First, the Court below completely ignored the standards for the grant of summary judgment. It found that Petitioner's interests had been adequately represented by the State, even though it was reviewing the grant of summary judgment and even though Petitioner alleged just the reverse. Quite clearly, this appellate fact-finding of a contested issue in a summary judgment determination was inappropriate.[9]

The finding of the Court below, moreover, was based on the legal conclusion that there is a presumption of adequate representation when a governmental body is charged with representing a non-party's interest. But Petitioner's suit was filed to prove that the State had not in fact carried out that obligation. Indeed the State's counsel had conceded

[9]The Court below also supported the grant of summary judgment by saying that while Petitioner alleged that its interests were not adequately represented, it did not "allege facts suggesting that its interests were not adequately represented." This is an erroneous standard on summary judgment, of course, and in any event factually erroneous. Petitioner's Complaint in *Firestone v. Taylor*, alleged the events of non-representation (see Paragraph 21, Appendix, p. 15a).

that it did not represent employers' interests: "I don't know where [Petitioner's] counsel gets the idea that the Attorney General represents the employers." "We represent the State of Michigan and the Commission in the matter and no employers necessarily."[10] Even if there were such a presumption as the Court below asserts, the existence of a presumption does not warrant dismissal by summary judgment of a suit brought to prove that the presumption was unwarranted on the facts of the particular case.

The extent to which the Court below misunderstood summary judgment is further demonstrated by its conclusion that "the district court did not abuse its *discretion* in entering summary judgment." (Emphasis added.)

Second, the Court below (and the District Court) ignored the procedural requirements of Title VII. Title VII contains a panoply of explicit preconditions for bringing suit. Before a person can bring a Title VII suit in Federal Court, she (or he) must first file a complaint with the appropriate state agency (if one exists) and with the EEOC. The exhaustion of these administrative remedies is a jurisdictional prerequisite to suit. Further, Title VII contains a specific statute of limitations. 42 U.S. §2000e-5. But the Claimants in *UAW v. Taylor* never brought proceedings before any state agency or the EEOC and did not satisfy the statute of limitations.

Third, the history of this proceeding demonstrates a pattern of deprivation of Petitioner's rights — raising significant Due Process and Article III questions:

1. The Consent Order was entered without any adversarial presentation of the issues, and without any representation of the interests of employers (who fund the unemployment benefits), and despite the fact that the

[10]Transcript of proceedings held in District Court December 9, 1975, p. 110; Joint Appendix in No. 76-1484, Sixth Circuit, p. 363.

parties had recently been warned by a state court not to undertake such a course. The entry of that Consent Order was void in that, under all the circumstances, the District Court did not have before it at the time it entered the Consent Order, a "case" or "controversy" within the meaning of Article III of the Constitution.[11]

2. The Consent Order was based upon completely unspecified "Federal law." In fact, there is no Federal law that supports the Consent Order.

3. The scope of the Consent Order was substantially revised and its cost to employers greatly expanded, in a subsequent order, again in which no employer participated.

4. When Petitioner moved, after the entry of the Order expanding the scope of the Consent Order, to intervene in order to litigate the validity of these Orders, its motion was denied.

5. Petitioner brought a separate action to establish the incontrovertible poisiton, *Provident Bank & Trust Co. v. Patterson, supra,* that one who is not party to a litigation cannot be bound by it and to obtain relief from the effects

[11]The Court below based its determination that there was a case or controversy on the statement that "the fact that *UAW v. Taylor* was eventually terminated with a consent judgment does not indicate that there was no case or controversy between the parties. See *United States v. Board of School Commissioners,* 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied,* 410 U.S. 909 (1973)." But the relevant inquiry is not merely whether there was a settlement, but whether the parties were in an adversarial posture before they ultimately settled the case.

In addition, the Consent Order itself actually proved there was no case or controversy. *Board of School Commissioners* held that a consent decree did not establish collusion because it "was the inescapable legal consequence of application of fundamental law to these facts." 466 F.2d at 575. That standard was clearly not met by the Consent Order: it was certainly not, as this Petition has amply demonstrated, an "inescapable legal consequence" that Section 48 of MESA was contrary to "Federal law."

of the Consent Order. But the District Court granted summary judgment against Petitioner on the ground that the Consent Order was *stare decisis,* although it has no legal basis and it is well established that "[b]eing a consent decree, it has little, if any, precedential value." *Ware v. Estes,* 328 F. Supp. 657, 659 (N.D. Tex. 1971), *aff'd,* 458 F.2d 1360 (5th Cir.), *cert. denied,* 409 U.S. 1027 (1972).

6. The Court of Appeals sanctioned without any legal justification this disregard of the law and of Petitioner's rights.

CONCLUSION

The decision below raises important questions of Federal law, and in several respects conflicts with the decisions of this Court and of other Circuits. It also departs from the accepted course of judicial proceedings.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 13, 1978

APPENDIX

[NOTICE OF ENTRY OF JUDGMENT BELOW]

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
JOHN P. HEHMAN FOR THE SIXTH CIRCUIT
CLERK CINCINNATI, OHIO 45202

November 16, 1977

Mr. Walter B. Connolly, Jr.
Mr. Francis J. Newton, Jr.
Mr. John A. Fillion
Mr. Frank J. Kelley
Mr. Robert A. Derengoski
Mr. John S. Hoff
Ms. Anna J. Diggs
Mr. A. L. Zwerdling
Mr. Ethan Vinson
Ms. Virginia McIntosh

Re: Case Nos. 76-1474, 76-1966-67 — International Union, et al., v. S. Martin Taylor, et al., Firestone Tire & Rubber Company, et al.

Gentlemen:

The Court today announced its decision in the above-entitled case.

A copy of the Court's opinion is enclosed, and a judgment in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Each party will bear its own costs on appeal in Nos. 76-1966 and 76-1967. Appellees will recover their costs on appeal in No. 76-1474 as provided by Rule 39, Federal Rules of Appellate Procedure.

Very truly yours,

John P. Hehman, Clerk

By Betty Tibbles /s/
(Mrs.) Betty Tibbles
Deputy Clerk

BT:jl
Enclosure

[OPINION BELOW]

NOT FOR PUBLICATION

NO. 76-1474
NO. 76-1966
NO. 76-1967

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Nov. 16, 1977
John P. Hehman, Clerk]

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, et al.	)	
Plaintiffs-Appellees (76-1474) Defendant-Cross-Appellant (76-1967)	)	
v.	)	
S. MARTIN TAYLOR, Director, and the MICHIGAN EMPLOYMENT SECURITY COMMISSION, et al.	)	
(76-1966) Defendants-Appellees (76-1474) Defendants (76-1967)	)	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
FIRESTONE TIRE AND RUBBER COMPANY, HAMILL MANUFACTURING CO. and FIRESTONE STEEL PRODUCTS COMPANY	)	
Petitioners for Intervention-Appellants (76-1474) Plaintiffs-Appellants (76-1966) Plaintiffs-Cross-Appellees (76-1967)	)	

Decided and Filed *November* 16, 1977

BEFORE: PHILLIPS, Chief Judge; LIVELY, Circuit Judge; and DUNCAN,* District Judge.

PER CURIAM. Appeals from final orders in two cases from the same district court have been consolidated. In No. 76-1474 Firestone appeals from an order denying its motion to intervene in an action (*UAW v. Taylor*) in which the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and various individuals were plaintiffs and the Michigan Employment Security Commission (MESC) and its director and members were defendants. Final judgment in *UAW v. Taylor* was entered by agreement of the parties on July 29, 1974. Firestone's motion to intervene was filed November 17, 1975.

In denying the motion to intervene for lack of timeliness the district court found that Firestone had "informal and actual notice" of the July 29, 1974 judgment and a subsequent order entered July 28, 1975. This finding is amply supported by the record. The district court found that Firestone was neither a necessary nor an indispensable party to *UAW v. Taylor*, which involved the validity under federal law of the practice of MESC of denying unemployment compensation to employees in Michigan who were forced to take leaves of absence due to pregnancy. We find no such compelling circumstances in this case as would require the district court to permit intervention after entry of final judgment. The district court did not abuse its discretion in denying intervention. *FMC Corporation v. Keizer Equipment Co.*, 433 F.2d 654 (6th Cir. 1970).

Approximately three months after it was denied intervention in *UAW v. Taylor*, Firestone filed an independent action in the district court seeking a declaratory judgment and injunctive relief (the second action). The

*The Honorable Robert M. Duncan, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

defendants in the second action were MESC together with its director and members and the UAW. In No. 76-1966 Firestone appeals from entry of summary judgment for all the defendants in the second action. UAW cross-appeals in No. 76-1967 from the district court's denial of its motion to recover its expenses in defending the second action.

Firestone based its claim for declaratory and injunctive relief on three contentions: (1) that the district court in *UAW v. Taylor* enjoined the operation of §48 of the Michigan Employment Security Act (the Act) "on the ground that it violated the United States Constitution," a judicial act requiring a statutory three-judge court; (2) that there was no case or controvery in *UAW v. Taylor;* and (3) that MESC failed to represent Firestone's interests. An examination of the record in *UAW v. Taylor* refutes these claims.

Judge Joiner specifically refrained from finding §48 of MESC unconstitutional. Rather, he found that the practices of MESC in administering the Act violated federal law. The plaintiffs in *UAW v. Taylor* had specifically pled that contract clauses requiring mandatory leaves of absence for pregnancy, which MESC was enforcing in its denial of unemployment benefits, violated Title VII of the 1964 Civil Rights Act. Both the July 29, 1974 and the July 28, 1975 orders of the district court, which Firestone attacked in the second action, referred specifically to June 30, 1965, the effective date of the Civil Rights Act of 1964. As to Firestone's second contention, the fact that *UAW v. Taylor* was eventually terminated with a consent judgment does not indicate that there was no case or controversy between the parties. See *United States v. Board of School Commissioners*, 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973).

Finally, Firestone fails to allege facts suggesting that its interests were not adequately represented. Courts have recognized that ". . . a presumption of adequate represen-

tation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee." (citations omitted). *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976), *cert. denied*, 426 U.S. 921 (1976). See *Southwest Airlines Co. v. Texas Intern. Airlines*, 546 F.2d 84, 98 (5th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3188 (1977). MESC has the authority to promulgate rules and regulations to carry out the provisions of the Act, M.C.L.A. §421.4; two of its four voting members represent employer interests, M.C.L.A. §421.3. Firestone does not claim that MESC acted in bad faith. Indeed, the record reveals competent representation by the Commission. That its efforts culminated in a consent decree is not evidence *per se* of inadequate representation. *United States v. Board of School Commissioners*, supra.

The district court decided the substantive issues in *UAW v. Taylor* which Firestone seeks to raise in the second action. At oral argument counsel for Firestone stated that the purpose of the second action is to get MESC and Judge Joiner to reexamine their positions. Having failed to make a timely motion to intervene in *UAW v. Taylor*, Firestone has no clear right to such a reexamination. The district court did not abuse its discretion in entering summary judgment for the defendants in the second action.

The judgments of the district court are affirmed on appeal and cross-appeal. The appellees will recover their costs on appeal in No. 76-1474. Each party will bear its own costs on appeal in Nos. 76-1966 and 76-1967.

[ORDER OF JUNE 17, 1976, DISMISSING PETITIONER'S COMPLAINT]

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN

THE FIRESTONE TIRE &
RUBBER COMPANY,
Plaintiff,

v. Civil Action
No. 670651

S. MARTIN TAYLOR, et al.
Defendants.

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT AND DISMISSAL AND DENYING MOTION FOR EXPENSES

At a session of said Court held in the
Federal Building, Detroit, Michigan
on the 17 day of June, 1976.

PRESENT: HONORABLE CHARLES W.
W. JOINER, DISTRICT JUDGE

Upon Motions submitted by the defendants, Briefs by counsel for all parties and after argument in open court,

IT IS HEREBY ORDERED AND ADJUGED as follows:

Upon stipulation by plaintiff, Keith Molin is hereby ordered dismissed as a party defendant in this action;

The Court, concluding that the Order of July 29, 1974, issued in *International Union, UAW, et al. v. Taylor, et al*, Civil Action No. 4-70066, is *stare decisis* upon the com-

plaint herein, and the Court concluding that *UAW v. Taylor* is correct on the merits, this Court hereby grants defendants motion for summary judgment and dismissal;

This Court hereby denies the motion by defendant International Union, UAW, for expenses.

Charles W. Joiner
District Judge

A True Copy:
Henry R. Hanssen, Clerk

Approved as to Form Only:

/s/ Michael J. Connolly
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[PETITIONER'S COMPLAINT]

[March 31, 1976]

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN

THE FIRESTONE TIRE & RUBBER COMPANY Plaintiff,	)	
v.	)	Civil Action No. 670651
S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, ALEX FULLER and KEITH MOLIN, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA. Defendants.	)	

COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTION AND OTHER RELIEF

NOW COMES the Plaintiff, by its counsel, and complains against the Defendants as follows:

1. Jurisdiction of this Court is based upon Sections 1331 and 1332 of the Judicial Code, 28 U.S.C. §§1331, 1332, the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, Rule 57 of the Federal Rules of Civil Procedure and upon the doctrine of pendent jurisdiction.

2. Venue of this action properly lies in this Court pursuant to Section 1391(b) of the Judicial Code, 28 U.S.C. §1391(b).

3. The Plaintiff is an Ohio corporation whose principal place of business is at 1200 Firestone Parkway, Akron, Ohio. Plaintiff does business in Michigan through its divisions Hamill Manufacturing Co. and Firestone Steel Products Co. and through its ownership of retail stores. It employs more than 2,000 persons within the State of Michigan. As an employer in Michigan, the Plaintiff is subject to the Michigan Employment Security Act ("MESA").

4. Defendant S. Martin Taylor, whose address is 7310 Woodward Avenue, Detroit, Michigan, is the Director of and ex officio member of the Michigan Employment Security Commission ("MESC"). Defendant MESC, the address of whose principal place of business is 7310 Woodward Avenue, Detroit, Michigan, is charged with the enforcement, operation and execution of the MESA. Defendants Frank Padzieski, Walter Campbell, Raymond M. Lyons, Alex Fuller and Keith Molin, whose addresses are: 15434 Michigan Avenue, Box 10, Dearborn, Michigan 48126; 1034 North Washington, Lansing, Michigan 48906; 10900 Harper, Detroit, Michigan 48213; 4046 Vicksburg, Detroit, Michigan 48204; and 300 E. Michigan Avenue, Lansing, Michigan 48926, respectively, are members of the MESC. All said defendants are sued in their official capacity and are referred to herein as the "State Defendants."

5. Defendant United Automobile Workers ("UAW") is a labor organization which is an unincorporated association whose principal place of business is 8000 East Jefferson Avenue, Detroit, Michigan. UAW represents and has represented as a plaintiff in the case in the United States District Court for the Eastern District of Michigan styled *United Automobile Workers, et al. v. Taylor, et al.* (Civil Action No. 4-70066) (hereinafter "UAW v. Taylor") its women members who are employees under the MESA.

6. The claims at issue herein arose in this District.

7. The amount in controversy in this action exceeds $10,000, excluding costs.

8. The MESA provides, *inter alia*, for the payment of unemployment benefits to persons who are unemployed and, after diligently attempting to find other work, have been unable to do so. The benefits paid are funded by mandatory assessments paid by Michigan employers. These assessments are calculated on the basis of the amount of benefits paid under the MESA to former employees of each employer. Thus, the contributions Plaintiff is and will be required to make under the MESA are proportional to the amount of benefits to which the State Defendants determine Plaintiff's former employees are entitled.

9. Section 48 of the MESA provides that a person on leave from his employment is not to be deemed unemployed for purposes of the Act and so is ineligible for benefits thereunder. This provision is included in the MESA in order to limit the costs of the program by excluding from eligibility for benefits persons who are not unemployed, but only on leave from their jobs.

10. The fund created by the MESA into which employer assessments are paid and out of which unemployment compensation benefits are paid is presently insolvent, and has been insolvent for approximately five years.

11. On July 29, 1974, the United States District Court for the Eastern District of Michigan issued an Order in *UAW v. Taylor*. A copy of this Order is attached hereto as Attachment A. This Order determined that application of Section 48 of the MESA to pregnant women violated "federal law" where they are not working because collective bargaining agreements contained mandatory pregnancy leave clauses or because employers unilaterally placed them on leave. The Court directed the State Defendants to pay MESA benefits to such pregnant women. On July 27, 1975, the aforesaid Court issued a further Order in *UAW v. Taylor*, expanding the relief granted by its 1974 Order.

12. Plaintiff was not a party to *UAW v. Taylor.* No party therein represented its interests, or those of any employer in the State of Michigan. The State Defendants (who were named as defendants in *UAW v. Taylor*) have conceded that they did not represent employers' interests. Plaintiff moved for leave to intervene in *UAW v. Taylor* on November 14, 1975, which motion was denied by the Court, per Joiner, J., on December 12, 1975.

13. As a result of the Orders issued in *UAW v. Taylor,* the State Defendants have paid and are continuing to pay unemployment benefits to pregnant employees not working at any time after June 30, 1965, because of mandatory pregnancy leave clauses in collective bargaining agreements or because of unilateral employer mandatory pregnancy leave policies; and, further, the State Defendants have engaged and continue to engage in a program of advertising and otherwise soliciting applications for benefits on the part of women who were not working because of such mandatory pregnancy leaves.

14. Defendant UAW, as part of its collective bargaining efforts in the late 1960's, requested that Plaintiff include provisions for mandatory pregnancy leave in the agreements between Defendant UAW and the Hamill Manufacturing Co. (a division of Plaintiff). Having previously voluntarily instituted such a policy, Plaintiff acceded to their request. The collective bargaining agreements between Hamill Manufacturing Co. and the UAW (beginning with an agreement effective December, 1967 for one plant in Michigan and with an agreement effective February, 1969 for the other plant in Michigan) each provided that pregnant women employees would be placed on leave from three months before the expected date of birth to six weeks after the birth. In addition, Firestone Steel Products Co. (a division of Plaintiff) instituted a like policy for its clerical employees in August of 1970. Beginning in April, 1972 and ending in July, 1973, Hamill Manufacturing Co. and

Firestone Steel Products provided that pregnancy leaves would not thereafter be mandatory.

15. Before Plaintiff changed its leave provision, it placed numerous women on mandatory pregnancy leave, who have received or will receive benefits being paid by the State Defendants pursuant to the Orders entered in *UAW v. Taylor.*

16. Such actions by the State Defendants are increasing and/or will increase Plaintiff's involuntary contributions under MESA by increasing the amount of benefits paid by the State Defendants that are charged to Plaintiff's rating account under MESA.

17. The Order issued by the Court in *UAW v. Taylor* on July 29, 1974, was based upon the Court's conclusion that Section 48 of MESA and the application of it by the State Defendants, which resulted in the denial of benefits under the MESA to women employees who are not working because of mandatory pregnancy leave provisions, "is unlawful as contrary to Federal law." Although the Order did not state on what provision of Federal law it was based, the Court subsequently explained that it was founded upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

18. No provision of Federal law, whether the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment, the Federal unemployment insurance statutes, Title VII of the Civil Rights Act of 1964 or any other provision, renders unlawful either (i) that part of Section 48 of the MESA which states that employees on leave are not eligible for unemployment compensation or (ii) the State Defendants' enforcement of that provision (prior to the Orders in *UAW v. Taylor*) by not paying unemployment compensation to pregnant employees not working because of mandatory pregnancy leave provisions. The Orders issued in *UAW v. Taylor* are based on an incorrect interpretation and application of Federal law.

19. By an Order entered December 12, 1975, denying Plaintiff's Motion to Intervene in *UAW v. Taylor*, Judge Joiner sought to buttress his Order of July 29, 1974, by citation of *Turner v. Department of Employment Security*, No. 74-1312, decided by the United States Supreme Court on November 17, 1975. *Turner* does not support the aforesaid Order of July 29, 1974, in that:

(a) A decision entered 16 months *after* the Order of July 29, 1974, cannot properly be invoked as a basis for that Order unless the Court reopens the case (which it refused to do).

(b) *Turner* in fact reaffirms the Supreme Court's prior decision that a social program may exclude benefits for pregnant women where, as is the case with the administration of MESA, such an exclusion is made for fiscal reasons.

20. The Court was without jurisdiction to enter the Order of July 29, 1974 (and the derivative Order of July 28, 1975) in that:

(a) The operation of a State statute may be enjoined on the ground that it violates the United States Constitution (the basis of the Order of July 29, 1974) only by a three-judge District Court, 28 U.S.C. §§2281.

(b) Because plaintiffs in *UAW v. Taylor* had alleged that MESA and its interpretation by the defendants named therein violated the United States Constitution (specifically, the Equal Protection Clause of the Fourteenth Amendment), a three-judge District Court was originally convened to hear the case. By Order dated September 20, 1973, that three-judge court, "*sua sponte*, having questioned whether the claim that the state statute involved is unconstitutional presents a substantial issue" concluded "that three judges are therefore not required to decide the merits of the case" and dissolved the three-judge court. It remanded the case to a single-judge court for determination of "whatever *other* federal grounds may be presented by the complaint"

(emphasis added). A copy of that Order is attached hereto as Attachment B.

(c) Nevertheless, Judge Joiner, the single judge to whom the case ultimately was referred, enjoined the operation of Section 48 of MESA on the ground that it violates the United States Constitution.

21. Further, the Order of July 29, 1974, is void and of no legal effect because *UAW v. Taylor* was not a case or controversy, as required by Article III, Section 2 of the Constitution, in that the defendants therein had no financial or other interest adverse to that of the plaintiffs and consequently failed to defend the action. Defendants never answered the complaint therein, or presented any brief or argument on the merits. Instead, they consented to the entry of the Order of July 29, 1974, so that the Court was deprived of the benefit of an adversary presentation. Consequently, for the reasons described above, the Order was erroneous as a matter of law and beyond the jurisdiction of the Court to enter.

First Cause of Action Against All Defendants

22. Plaintiff herein repeats and realleges the allegations contained in Paragraphs 1 through 21 hereof, with the same force and effect as though fully set forth herein.

23. Any assessments by the State Defendants against Plaintiff for benefits paid by those Defendants pursuant to the Orders in *UAW v. Taylor* would be in violation of Federal law in that the Orders:

(a) are erroneous as a matter of law;
(b) are void; and
(c) were beyond the jurisdiction of the Court to enter.

Second Cause of Action Against All Defendants

24. Plaintiff herein repeats and realleges the allegations contained in Paragraphs 1 through 21 hereof, with the same force and effect as though fully set forth herein.

25. Any assessments by the State Defendants against Plaintiff for benefits paid by those Defendants pursuant to the Orders in *UAW v. Taylor* would represent deprivations of Plaintiff's property in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution in that Plaintiff would be required to pay money as the result of Orders:

(a) which were entered in a case in which Plaintiff was not a party (despite its efforts to intervene) and in which Plaintiff's interests were not represented;

(b) which are erroneous as a matter of law;

(c) which are void; and

(d) which were beyond the jurisdiction of the Court to enter.

Third Cause of Action Against All Defendants

26. Plaintiff herein repeats and realleges the allegations contained in Paragraphs 1 through 21 hereof, with the same force and effect as though fully set forth herein.

27. By failing to represent the interests of Plaintiff and other employers in Michigan and by failing to defend *UAW v. Taylor*, the State Defendants violated their duties to employers under MESA and violated Plaintiff's right under the Fifth and Fourteenth Amendments of the United States Constitution to (a) Equal Protection of the laws and (b) Due Process of law.

Fourth Cause of Action Against All Defendants

28. Plaintiff herein repeats and realleges the allegations contained in Paragraphs 1 through 21 hereof, with the same force and effect as though fully set forth herein.

29. By failing to represent the interests of Plaintiff and other employers in Michigan and by failing to defend *UAW v. Taylor*, the State Defendants violated their fiduciary duty to Plaintiff to ensure that benefits are paid only in accordance with the MESA and other applicable law.

WHEREFORE, the Plaintiff respectfully prays that this Court:

1. Adjudge, declare and decree, pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, that Federal law does not invalidate Section 48 of MESA and does not require the State Defendants to pay benefits under the MESA to pregnant women who are not working because they are or were on mandatory pregnancy leave;

2. Adjudge, declare and decree, pursuant to the Declaratory Judgment Act, that the State Defendants may not include in the calculation of the amount Plaintiff is assessed under the MESA the benefits paid to women placed on mandatory pregnancy leave by Plaintiffs;

3. Permanently enjoin the State Defendants from including in the calculation of the amount Plaintiff is assessed under the MESA the benefits paid to women placed on mandatory pregnancy leave by Plaintiffs;

4. Order the State Defendants, pursuant to Section 16 of the MESA, to return to Plaintiff all contributions made by it on account of benefits paid pursuant to *UAW v. Taylor;*

5. Order the State Defendants, pursuant to MESA Sections 16 and 20, to adjust Plaintiff's rating account so that all charges to Plaintiff's rating account which have been made for benefits paid pursuant to *UAW v. Taylor* are reversed and credited to future proper charges to Plaintiff under the MESA, and so that Plaintiff's rating account will be in the same status as it would have been if no benefits had been paid pursuant to *UAW v. Taylor;* and, direct that the State Defendants apply to future proper assessments which may be due from the Plaintiffs under MESA all amounts by which its contributions under the MESA have increased because of the State Defendants' payment of unemployment benefits pursuant to the Orders in *UAW v. Taylor* to employees of the Plaintiff not working because there were or are on mandatory pregnancy leave;

6. Grant costs of suit to the Plaintiff; and

7. Grant such other and further relief as may appear to the Court to be equitable, just and proper.

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Dated: March , 1976

[Attachments Not Reproduced]

[ORDER DENYING PETITIONER'S MOTION TO INTERVENE]

[December 12, 1975]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, PATRICIA SCHENK, BETTY J. ARNOTT, DOLORES BIERI, JACQUELINE E. BOND, PATRICIA IGNASH, NANCY JANIK, JEAN PERUSKI, YVONNE REINKE, VIRGINIA M. SADRO, DELARAY V. SHAMKA, GLENDA SWARTZ, JUDITH M. WELLS, EVELYN ROZANKOVICH, SHIRLY ANN HALL, ELIZABETH RICHMOND, NANCY L. EBY, BARBARA KLIMAZEWSKI, ANTONIA POWELL WILSON, on behalf of themselves and on behalf of all women employees in Michigan,
Plaintiffs,

v.

Civil Action
No. 4-70066

S. MARTIN TAYLOR, Director, and the MICHIGAN EMPLOYMENT SECURITY COMMISSION, et al.,
Defendants.

ORDER

General Motors Corporation (GM) and the Firestone Tire & Rubber Company (Firestone) have filed motions to intervene in this action. GM also seeks clarification of the court's order dated July 29, 1974 and moves to vacate the court's order dated July 28, 1975. In conjunction with its motion to intervene, Firestone has filed motions to reopen

this case, to dissolve the court's orders, and to stay action until the court rules upon its motion to intervene.

The Employer's Unemployment Compensation Council (EUCC) has also filed a motion to intervene in order to participate as *amicus curiae*, and the Center for Urgan Law and Housing has likewise filed a motion for leave to file a brief as *amicus curiae*. The State Attorney General, on behalf of defendants, has filed a motion for interpretation and clarification of the court orders dated July 29, 1974 and July 28, 1975. Plaintiffs have filed briefs in opposition to the foregoing, accompanied by affidavits and exhibits.

After oral argument and upon consideration of the motions, briefs, exhibits, and affidavits, IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. GM's and Firestone's motions to intervene are denied as untimely under Fed.R.Civ.P. 24; *see NAACP v. New York*, 413 U.S. 345, 365-67 (1973). Both GM and Firestone at the very least had informal and actual notice of this suit and of the court's orders dated July 29, 1974 and July 28, 1975. Neither GM nor Firestone is or was an indispensable or necessary party to this suit. Moreover, intervention would not change the outcome of this suit. In light of *Turner v. Department of Employment Security & Board of Review of the Industrial Commission of Utah*, 44 U.S.L.W. 3298 (11/18/75), the court is convinced of the correctness of its prior orders in this case.

2. The court's orders dated July 29, 1974 and July 28, 1975 were intended to distinguish between two groups of women employees denied MESA benefits solely due to mandatory maternity leave contract clauses and to leaves of absence or terminations unilaterally imposed due to employer policies: those women forced out of work between June 30, 1965 and April 5, 1972; and those women forced out of work after April 5, 1972. With regard to the latter group, the defendants had the burden of initiating the examination, hearing, rehearing, and reconsideration of

claims in the light of the July 29, 1974 order. With regard to the former group, the claimants themselves had the burden of initiating the examination, hearing, rehearing, and reconsideration of claims.

The law applicable to both groups is the same:

> "[T]he practice of denying benefits under the Michigan Employment Security Act to women employees, who are forced out of work due to so-called mandatory maternity leave clauses in contracts or to unilateral employer policies, is unlawful as contrary to Federal law."

Order of July 29, 1974.

Moreover, as declared in the court's order of July 28, 1975:

> "[T]he MESC Instructions to Branch Offices of August 30, 1974, concerning implementation of this Court's order of July 29, 1974, [are to] be applied to the benefit of Petitioners and all others in their position. . . ."

The "forced out of work" language employed in the court's order embraces those class members who have been terminated from employment or discharged because of pregnancy in addition to those claimants subject to mandatory leaves of absence because of contracts or unilateral employer policies.

3. The issue is raised that the orders are violative of the statute of limitations. The Michigan Employment Security Act does not contain a statute of limitations as such. In addition, any defense to this suit predicated upon the statute of limitations has long since been waived. The terms of the court's order dated July 29, 1974 which defined the lower limit of the class as including women forced out of work on or after June 30, 1965 were the product of the parties' arms-length settlement negotiations approved by the court.

4. The defendant MESC's Instructions to Branch Offices of August 30, 1974, appropriately capture the intent of the court's order of July 29, 1974. Those instructions, with regard to the certification requirements imposed upon class members filing retroactive claims for benefits and reflected in MESC Form 1276, accord with the court's view of how the "seeking work" and "availability" requirements imposed by section 28 of the MESA, MCLA 421.28, should be met.

MESC Form 1276 provides, in pertinent part, as follows:

> "CERTIFICATION: I hereby certify that during the week(s) indicated opposite my signature, and except as otherwise shown below or reported by me to this Commission:
>
> (1) I was registered for and seeking work or I did not register and did not seek work because I was on a mandatory maternity leave of absence and understood I was ineligible for benefits . . .
>
> (3) I was *able* and *available* to perform full-time work. . . ."

Although this certification requirement for class members differs from requirements imposed upon non-class members, it is appropriate for the defendants to use different standards for assessing the claims of class members under section 28 of MESA. Class members have been denied employment because of mandatory maternity leave policies or contract clauses which are contrary to law and as a result the procedures set forth in the instructions are the only procedures that should reasonably be required of claimants to show compliance with section 28 of the Act.

5. Defendant Taylor is hereby authorized after January 1, 1976 to set a date by which class members must file retroactive claims for benefits. The date so set should provide at least 60 days' notice from the date notice is

publicly given to members of the class as defined below. The notice of the date set should be publicized throughout the state by an appropriate press release and by notices posted in defendants' branch offices at least 60 days prior to the date set as the cut-off date.

6. The defendants are hereby required to reopen, rehear, and reconsider, in the light of this and prior orders, all claims by members of the class denied since July 29, 1974 and not later granted for reasons inconsistent with the court's orders and the MESC Instructions to Branch Offices of August 30, 1974.

7. The EUCC's motion to intervene as *amicus curiae* is denied. The Center for Urban Law and Housing's motion for leave to file a brief is likewise denied. The parties have more than amply explored the issues before the court, and disposition of this action renders help from *amici* unnecessary.

So ordered.

Charles W. Joiner /s/

CHARLES W. JOINER
United States District Judge

Dated: December 12, 1975
Detroit, Michigan

[ORDER OF JULY 28, 1975]

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al, PATRICIA SCHENK, BETTY J. ARNOTT, DOLORES BIERI, JACQUELINE E. BOND, PATRICIA IGNASH, NANCY JANIK, JEAN PERUSKI, YVONNE REINKE, VIRGINIA M. SADRO, DELARAY V. SHAMKA, GLENDA SWARTZ, JUDITH M. WELLS, EVELYN ROZANKOVICH, SHIRLY ANN HALL, ELIZABETH RICHMOND, NANCY L. EBY, BARBARA KLIMAZEWSKI, ANTONIA POWELL WILSON, on behalf of themselves and on behalf of all women employees in Michigan,

Plaintiffs

-v- CIVIL ACTION NO. 4 70066

S. MARTIN TAYLOR, Director, and the Michigan Employment Security Commission, et al,

Defendants

ORDER GRANTING MOTION OF PETITIONERS

On motion of Petitioners, female employees in the Civil Service of the State of Michigan, by and through their attorneys, Zwerdling, Maurer, Diggs and Papp, that they be afforded all relief appropriate to membership in the class embraced by this Court's Order and Judgment of July 29, 1974; the Court having examined said Motion, Defendants' Answer thereto; the pleadings filed by Plaintiff UAW in support of Petitioners herein; the Briefs filed by counsel, and the files in the matter; and having heard argument by

counsel for all parties, and being fully advised in the premises; and it appearing to the Court that Petitioners' Motion should be granted;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. That this Court's Order of July 29, 1974 was intended to, and by its plain language did, relate to a class of persons including all women forced out of work in Michigan due to pregnancy subsequent to June 30, 1965, whether State of Michigan employees or not; and that the class, therefore, includes these Petitioners, and all persons in their position.

2. That this Court finds no merit in Defendants' argument that the Eleventh Amendment of the U.S. Constitution prohibits this Court from adjudicating the entitlement of Petitioners, as State employees, to unemployment compensation benefits.

3. That the MESC Instructions to Branch Offices of August 30, 1974, concerning implementation of this Court's Order of July 29, 1974, be applied to the benefit of Petitioners and all others in their position, whom this Court hereby finds to be members of the class represented by Plaintiffs herein, in accordance with its Opinion as rendered from the Bench on hearing of this matter on July 14, 1975.

/s/ Charles Joiner,

Hon. Charles Joiner,
U.S. District Judge

Notice of Entry Waived
APPROVED:

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[ORDER OF JULY 29, 1974]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al,
Plaintiffs,

v.

Civil Action
No. 4-70066

S. MARTIN TAYLOR, Director, and the MICHIGAN EMPLOYMENT SECURITY COMMISSION, et al,
Defendants.

ORDER AND JUDGMENT

At a session of said Court held in the Federal Building, in the City of Detroit, State of Michigan, this day of , 1974.

PRESENT: HONORABLE CHARLES JOINER
U.S. DISTRICT JUDGE

Upon plaintiffs' Complaint, attachments to said Complaint, and Motion for Partial Summary Judgment, upon submission of this Order and Judgment by plaintiffs, after extensive conferences in Chambers, upon notice to members of the class named in plaintiffs' Complaint, and after a hearing in open Court, and the Court being fully advised in the premises:

NOW THEREFORE, it is hereby ordered and adjuged as follows:

I. It is declared that the practice of denying benefits under the Michigan Employment Security Act* to women employees, who are forced out of work due to so-called mandatory maternity leave clauses in contracts or to unilateral employer policies, is unlawful as contrary to Federal law. This Court expressly does not rule upon the validity of Section 48, MESA, or the leave of absence portion of said Section.

II. Defendants, their successors in office, agents and employees are hereby enjoined from denying benefits under the MESA to women employees solely due to their having involuntarily been placed on "leaves of absence" under said maternity leave clauses in contracts or unilateral employer policies.

III. Defendants, their successors in office, agents and employees are ordered to reopen, rehear and reconsider, in light of this Order and Judgment, the claims of all employees-claimants denied MESA benefits from and after April 5, 1972, solely due to such mandatory maternity leave contract clauses and to such "leaves of absence" unilaterally imposed due to employer policies. It is hereby ruled that said claims may be reopened under the MESA, because the issue in question — i.e., the lawfulness of said contract clauses and the State practice in relation thereto — was not heretofore "disputed" within the MESA. This Order does not prejudice the rights or alleged rights of any employee-claimant, who was denied MESA benefits between June 30, 1965 and April 5, 1972, to on her own individually request the MESC for benefits which had been denied because of said maternity leave policies.

---

*Mich. Comp. Laws, Secs. 421-1 *et seq.*: Mich. Stats. Ann. Secs. 17.501, *et seq.*: hereinafter usually referred to as "MESA".

Approved:

/s/ Charles Joiner
Hon. Charles Joiner
U.S. District Judge

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Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1147

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v

S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, AND ALEX FULLER, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS, MICHIGAN EMPLOYMENT SECURITY COMMISSION, ITS DIRECTOR AND COMMISSIONERS, IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1147

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v

S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, AND ALEX FULLER, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS, MICHIGAN EMPLOYMENT SECURITY COMMISSION, ITS DIRECTOR AND COMMISSIONERS, IN OPPOSITION

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Sixth Circuit is reproduced in Firestone's Appendix (3a-6a).[1]

[1] Pages of Firestone's Appendix will be cited in parenthesis as (a).

The Sixth Circuit affirmed orders of the United States District Court for the Eastern District of Michigan entered December 12, 1975 (19a-23a) and January 19, 1976 (7a-8a), holding, respectively, that Firestone could not intervene in *UAW* v *Taylor,* [2] to bring a separate action (*Firestone* v *Taylor & UAW*) to assert that two earlier orders of the District Court in *UAW* v *Taylor* were invalid and were not binding upon Firestone. The two earlier orders, entered July 29, 1974, and July 28, 1975, are set forth in Firestone's Appendix at pp 27a-29a and 24a-25a, respectively.

STATEMENT OF THE CASE

A. *UAW, et al* v *Taylor, et al.*

Firestone does not seek *certiorari* in regard to the Court of Appeals' affirmance of the orders entered in *UAW* v *Taylor.* It does, however, seek review of the affirmance of the dismissal of *Firestone* v *Taylor,* which was its own suit brought to set aside *UAW* v *Taylor.* Thus, *UAW* v *Taylor,* although final in all respects, must be considered in evaluating Firestone's Petition for a Writ of Certiorari.

The UAW and a number of women (claimants and potential claimants for unemployment benefits) sued the MESC on their own behalf and on behalf of a class of women similarly situated to stop it from denying unemployment benefits to women who were forced out of work by their employers because of pregnancy. Their complaint was filed on July 16, 1973. In the complaint, they sought declaratory and injunctive

---

[2]

The first and main suit *UAW* v *Taylor,* CA 6 No. 76-1474, will usually be called "*UAW* v *Taylor*" or "*Taylor.*" Firestone's new suit, *Firestone Tire & Rubber Company* v *Taylor,* CA 6 Nos. 76-1966 and 76-1967, will usually be called "*Firestone* v *Taylor*" or "*Firestone.*"

relief. The complaint alleged, *inter alia,* that the MESC's denial of unemployment benefits to pregnant employees who were placed on mandatory leave, as required by section 48 of the Michigan Employment Security Act; MCLA 421.48; MSA 17.552, deprived them of the equal protection of the laws, deprived them of privileges and immunities granted Michigan working women, violated Title VII of the 1964 Civil Rights Act, impeded and defeated the purposes and policies of the federal unemployment insurance program, and violated section 303(a)(1) of the Social Security Act. (Appendix below, pp 6-7.) The suit did not seek unemployment benefits for any particular woman or ask that the rating account of any employer be charged for such benefits. It asked that MESC be ordered to stop the automatic denial of claims for unemployment benefits of women forced out of work due to pregnancy without consideration of each woman's ability to continue in her employment. In effect, the suit challenged the presumption implicit in section 48 of the Michigan Employment Security Act that a woman was unable to work and, consequently, ineligible for benefits because she was pregnant.

On August 6, 1973, MESC moved that the complaint be dismissed because UAW and the individual plaintiffs had failed to join as defendants parties who had an interest in the controversy and whose presence was deemed indispensable for adjudication. (Appendix below, pp 10-11.) The trial court never ruled on this motion.

Pursuant to the request in the complaint, a 3-judge court was convened on September 13, 1973. After a brief hearing in chambers, at which counsel for both sides were present, then Court of Appeals Judge Wade H. McCree and then District Judges Damon J. Keith and Cornelia G. Kennedy concluded that the case should be remanded to a single judge, because the panel questioned whether the claim that the state statute involved was (unconstitutional) presented a substantial issue.

(Appendix below, p 71.) Nevertheless, the Court granted UAW until July 20, 1973, to file a brief in support of its contention that a 3-judge court was required to decide the merits of the case. On September 17, 1973, the request for a 3-judge court was withdrawn by UAW, and, on September 20, 1973, the 3-judge court entered an order dissolving itself and remanding the case for "consideration of the single judge (Judge Keith) to whom it was initially assigned for determination of whatever federal grounds may be presented by the complaint." (Appendix below, p 71.)

Thereafter, in March, 1974, the case was reassigned to Judge Charles W. Joiner, who scheduled a pretrial hearing for April 15, 1974. (Appendix below, p 74.) At this hearing, which, in point of time, was after the decision of this Court in *Cleveland Board of Education* v *LaFleur*, 414 US 632; 94 S Ct 791; 39 L Ed 2d 52 (January 21, 1974), counsel for UAW and MESC informed the Court that a proposed order satisfactory to the parties would be prepared disposing of the issues raised in the complaint. It was further agreed at this meeting, and the Court so ordered, that a notice would be published in certain newspapers with general circulation in the State of Michigan informing plaintiff class members of the proposed settlement order. In these notices, the class members were informed of the terms of the proposed order and that they would be included in the class affected by the terms thereof, unless they exercised their right to be excluded therefrom by a certain date. The notice also informed the members of the class that the order would be entered on July 29, 1974. The notice was published in the Detroit News, Detroit Free Press, State Journal (Lansing), Flint Journal, Grand Rapids Press, and the Marquette Mining Journal. No objections were raised to the proposed order and, on July 29, 1974, an Order was entered declaring that the MESC's denial of unemployment benefits to any woman employee who was forced out of work due to so-called mandatory maternity leave clauses in contracts or

to unilateral employer policies was unlawful as contrary to federal law (28a). The terms of the order also provided that the MESC was to reopen, rehear, and reconsider, in light of the order, the claims of all claimants denied MESA benefits from and after April 5, 1972, solely due to mandatory maternity leave contract clauses and to leaves of absence unilaterally imposed due to employer policies. Without mention of the Civil Rights Act of 1964, it was further specified in the order that its entry would not prejudice the rights of any claimant who was denied unemployment benefits between June 30, 1965, and April 5, 1972, "to on her own individually request the MESC for benefits which had been denied because of said maternity leave policy" (28a).

The July 29, 1974 order further provided that "[t]his court expressly does not rule on the validity of Section 48, MESC, or the leave of absence portion of said Section" (28a).

Firestone's statement that the Court order was "totally silent" on what provision of federal law was contravened by section 48 MESA is misleading. The order was based upon UAW's complaint and Motion for Partial Summary Judgment (27a). Its complaint set forth several federal laws which were impeded or violated by MESC's application of section 48. UAW's motion for partial summary judgment and brief were based upon these same federal grounds.

Thereafter, in conformity with the Court's order, the MESC issued public notices relative to the contents of the order. It also issued instructions to its operating staff implementing the Court's order. (Appendix below of UAW and MESC, pp 2-5.)

Members of the plaintiff class thereafter filed claims for benefits throughout the state. To obtain wage information from the affected employers, the Commission devised certain forms which were mailed to the employers notifying them of

the Court order and judgment, and why the wage information was necessary. Form MESC 1277 (Appendix below, p 97), accompanied all requests for wage information and informed the employers of the Court order. Unemployment benefits were thereafter paid by the Commission in accordance with the order and judgment of July 29, 1974.

In June, 1975, women who had been employed by the State of Michigan and who had been forced to quit their jobs because of pregnancy filed a motion to be included in the class affected by the Court's order of July 29, 1974. The MESC opposed this order on the ground that such women were not within the plaintiff class. In an order entered on July 28, 1975, the Honorable Charles Joiner held that his order of July 29, 1974, related to a class of persons including all women forced out of work in Michigan due to pregnancy subsequent to June 30, 1965, whether State employees or not. He further held that the Michigan Employment Security Commission instructions to its branch offices of August 24, 1974, implementing the Court's order of July 29, 1974, should be applied for the benefit of the petitioning State employees. (Appendix below, pp 77-78.)

B. *Firestone* v *Taylor, et al.*

On March 31, 1976, while its *UAW* v *Taylor* appeal to the Court of Appeals for the Sixth Circuit was pending, Firestone filed a new suit in the District Court for declaratory judgment, for an injunction and other relief, naming the state officers who were defendants in the *UAW* suit and the UAW as defendants. In this action, Firestone attempted to set aside the July 29, 1974 judgment in *UAW* v *Taylor* and to have the District Court issue a declaratory judgment in direct opposition to that issued in *UAW* v *Taylor*, on the grounds that *UAW* v *Taylor* judgment was contrary to law on the merits of the substantive issues (14a-17a).

Firestone also asked the Court to enjoin the MESC from including in its calculations of the amount Firestone is assessed under the Michigan Employment Security Act, benefits paid to women placed on maternity leave by Firestone, and to credit Firestone's rating account for any amounts charged against it by the state due to *UAW* v *Taylor* (17a). In addition, Firestone requested that the Court declare that federal law does not invalidate section 48 of the Michigan Employment Security Act, MCLA 421.48; MSA 17.552.

The respondents filed motions for summary judgment supported by affidavits and other material. (Appendix below, pp 401a-412a.) Firestone filed no counter affidavits.

On June 17, 1976, the District Court granted respondents' Motions for Summary Judgment and dismissed Firestone's suit, holding that its order of July 29, 1974, issued in *UAW* v *Taylor*, was *stare decisis* upon the complaint (7a-9a).

The Sixth Circuit Court of Appeals affirmed this order granting summary judgment. It also affirmed the order of December 12, 1975, which denied Firestone intervention in *UAW* v *Taylor*.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DENIAL OF FIRESTONE'S MOTION TO INTERVENE IN UAW v TAYLOR.

The District Court's denial of Firestone's motion to intervene in *UAW* v *Taylor*, because of untimeliness, was affirmed by the Court of Appeals. The Court of Appeals also cited Fire-

stone's untimely attempt to intervene in *Taylor* as a reason for affirming the dismissal by the District Court of *Firestone* v *Taylor* (4a-6a).

Firestone does not seek review of the denial of intervention and does not argue that issue in its Petition. It nevertheless attacks this now final determination in its Arguments II and III by asserting that the consent order entered in *UAW* v *Taylor* is not binding on it because it was not represented in that suit. Thus, it, in effect, contends that the refusal to permit its intervention was erroneous.

This totally disregards what the Court of Appeals said when it affirmed the denial. That Court made it plain that untimeliness was not the sole reason for denying Firestone's intervention motion. Another reason for the denial was the fact that Firestone was not a necessary or indispensable party to that action. In pertinent part, the Court of Appeals said (4a):

> "Final judgment in *UAW* v. *Taylor* was entered by agreement of the parties on July 29, 1974. Firestone's motion to intervene was filed November 17, 1975.
>
> "In denying the motion to intervene for lack of timeliness the district court found that Firestone had 'informal and actual notice' of the July 29, 1974 judgment and a subsequent order entered July 28, 1975. This finding is amply supported by the record. The district court found that Firestone was neither a necessary nor an indispensable "party to *UAW* v. *Taylor*, which involved the validity under federal law of the practice of MESC of denying unemployment compensation to employees in Michigan who were forced to take leaves of absence due to pregnancy. We find no such compelling circumstances in this case as would require the district court to permit intervention after entry of final judgment. The district court did not abuse its discretion in denying intervention."

The denial of intervention to an employer in an unemployment case where the validity of a state unemployment compensation law was at issue was recently ordered by this Court in *Ohio Bureau of Employment Services* v *Hodory*, 429 US 814; ..... S Ct .....; ..... L Ed 2d ..... (1976). See also, *NAACP* v *New York*, 413 US 345, 365-367; 93 S Ct 2591; 37 L Ed 2d 648 (1973); *Nevilles* v *Equal Employment Opportunity Commission*, 511 F2d 303, 305 (CA 5, 1975).

In its Argument III, Firestone asserts that the MESC did not adequately represent its interests. This claim was also asserted below.

In rejecting Firestone's contention in this regard, the Court of Appeals said (5a-6a):

> "Finally, Firestone fails to allege facts suggesting that its interests were not adequately represented. Courts have recognized that '. . . a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee.' (citations omitted). *Commonwealth of Pa.* v. *Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976), cert. denied, 426 U.S. 921 (1976). See *Southwest Airlines Co.* v. *Texas Intern. Airlines*, 546 F.2d 84, 98 (5th Cir. 1977), cert. denied, 46 U.S.L.W. 3188 (1977). MESC has the authority to promulgate rules and regulations to carry out the provisions of the Act, M.C.L.A. §421.4; two of its four voting members represent employer interests, M.C.L.A. §421.3. Firestone does not claim that MESC acted in bad faith. Indeed, the record reveals competent representation by the Commission. That its efforts culminated in a consent decree is not evidence *per se* of inadequate representation."

The MESC is represented by the Michigan Attorney General in all legal matters. The MESC *qua* MESC does not represent either claimants or employers. The Attorney General represents the MESC *qua* MESC. The Michigan Employment Security Act, subsection 11(k); MCLA 421.11(k); MSA 17.511(k), specifically provides that the Attorney General of the State shall represent the MESC in any court proceeding. The MESC does not represent either employer or claimant interests in litigation. In legal proceedings, its duty is to propound the law as it interprets it. The statement of the Assistant Attorney General that his office represents the "State and the Commission . . . and no[t] employers necessarily," properly reflects the Commission's role in civil actions. His statement was intended to convey to the District Court that the Commission's position in a judicial proceeding is its own and does not necessarily reflect the position of employers or of claimants.

The Commission has 4 voting members, 2 representing employers and 2 representing claimant interests.

The Court of Appeals found that the Commission was competently represented in *UAW* v *Taylor*. It also found that the culmination of that suit in a consent decree was not evidence *per se* of inadequate representation. The contention in Firestone's brief (22a-23a) that "the state's counsel had conceded that it did not represent employers' interests," consequently, is misleading to say the least.

II.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION.

A.

Firestone's suit was properly dismissed by the Court below on the basis of stare decisis. The doctrines of res judicata and collateral estoppel are also proper bases for dismissal of Firestone's suit.

The District Court held that *UAW* v *Taylor* was controlling in Firestone's suit against MESC and UAW and correctly made *stare decisis* the basis for dismissing Firestone's complaint. The Court of Appeals properly affirmed this holding. Petitioner does not seek Certiorari in *UAW* v *Taylor*. That decision is, therefore, final.

The District Court could have found that Firestone's suit was also barred by the doctrines of *res judicata* and collateral estoppel.

While the facts indicate that all three doctrines could have been applied, any one was sufficient to correctly cause the dismissal of Firestone's action.

All three doctrines are still controlling here.

1. **Stare decisis was an appropriate ground for dismissal of Firestone's case since UAW v Taylor established the rule of law for the case and was in conformance with this Court's holding in Turner v Department of Employment Security, et al, 423 US 44 (1975).**

Stare decisis is a principle of broad application. In essence, it means that for purposes of consistency and permanence, Courts

should let stand those rules of law that have been decided by previous Courts. See 1 B J. Moore, Federal Practice ¶ 0.401, at 11 (2d ed. 1974).

Clearly, Firestone's suit against MESC and UAW raised the exact same questions of law as were decided in *UAW* v *Taylor*. And, indisputably, the suit was instituted to unfound and reverse the District Court's orders in that case.

Firestone did not even attempt to factually distinguish its case from *UAW* v *Taylor*. Since Firestone's complaint could not show that the rule of law in *UAW* v *Taylor* should be overruled in light of this Court's decision in *Turner* v *Department of Employment Security & Board of Review of the Industrial Commission of Utah*, 423 US 44; 96 S Ct 249; 46 L Ed 2d 181 (1975), the District Court correctly dismissed Firestone's action.

2. Firestone's suit is also barred by the doctrine of res judicata.

While the doctrine of *stare decisis* can apply to litigants who had no connection to the litigation which established a given rule of law, the doctrine of *res judicata* applies to parties who have already litigated an issue on the merits and are bound by a valid final judgment. See, 1 B J. Moore, Federal Practice ¶ 0.401, at (2 ed. 1974).

In the case of *Sadro* v *Hamill Mfg, Division of Firestone and MESC*, the Ingham County Circuit Court, No 15738C, citing *UAW* v *Taylor*,[3] found that the MESC could not deny unemployment benefits to women forced out of work by mandatory maternity leave contracts. Ms. Sadro was one of the named

[3] For the *Sadro* material and affidavits establishing service on Firestone, see Appendix below, pp 167-201.

plaintiffs in *UAW* v *Taylor*. Instead of attempting to appeal the correctness of the state court's decision, and, therefore, the correctness of *UAW* v *Taylor*, Firestone let its appeal in *Sadro, supra*, lapse, and, as a result, the judgment entered in that action became a valid final judgment. All of the issues raised in *Sadro, supra*, are the issues which Firestone is attempting to relitigate here.

This is precisely the type of situation to which the doctrine of *res judicata* was meant to apply. See *Cacavas* v *General Motors Corp*, 444 F2d 506 (CA 6, 1971); *International Association of Machinists, Local Lodge No 1038* v *Jeffrey Galion Manufacturing Co*, 350 F2d 512 (CA 6, 1965).

3. The doctrine of collateral estoppel precludes Firestone's suit.

The doctrines of *res judicata* and *collateral estoppel* are often used interchangeably. The effect of judicial finality can obtain through the application of either doctrine.

Stated simply, *res judicata* is meant to prevent parties or their privies from relitigating a cause of action which has been settled by a valid final judgment. Collateral estoppel also prevents parties and their privies from litigating a different cause of action, if the basis for the different cause involves relitigating issues that have already been decided in a previous cause of action.

Firestone, in the instant case against MESC, is attempting to relitigate the substantive issues it could have litigated in *Sadro, supra*. The decision in *Sadro* is *res judicata* and precludes the present action. Firestone is also estopped from collaterally attacking the findings in *Sadro, supra*, in its suit. This is because the parties are identical and the cause of action is the same.

Although Firestone was not a formal party to *UAW* v *Taylor*, it is, nevertheless, collaterally estopped from attacking the orders entered in *UAW* v *Tayor*. As the Court of Appeals stated (6a), the MESC is presumed to have represented its interests in that proceeding, citing *Commonwealth of Pennsylvania* v *Rizzo*, 530 F2d 501, 505 (CA 3, 1976), cert. denied, 426 US 921; 96 S Ct 2628; 49 L Ed 375 (1976). See *Kersh Lake Drainage District* v *Johnson*, 309 US 485; 60 S Ct 640; 84 L Ed 881 (1940); *United States* v *Kabinto*, 456 F2d 1087 (CA 9, 1972).

Given that Firestone was represented in *UAW* v *Taylor*, and that the issues decided in *UAW* v *Taylor* are dispositive of Firestone's case against MESC, the doctrine of collateral estoppel applies to bar its present action.

B.

The District Court in UAW v Taylor had jurisdiction to invalidate a state agency practice which conflicted with federal law.

The petitioner here challenges the jurisdiction of the District Court to enter the orders of July 29, 1974, and July 28, 1975, in *UAW* v *Taylor*, thus, apparently asserting that these orders are not *stare decisis* upon its complaint. In *UAW* v *Taylor*, Judge Joiner, contrary to petitioner's repeated assertions, invalidated no state law. He merely held that a practice of the MESC conflicted with federal statutory law.

Two decisions of this Court that invalidated the operation of state unemployment compensation practices under the Supremacy Clause because they conflicted with federal law demonstrate that the order in *UAW* v *Taylor* falls within the recognized contours of federal judicial power.

The decision in *Nash* v *Florida Industrial Commission*, 389

US 245; 88 S Ct 362; 19 L Ed 2d 438 (1967), is directly in point to the case at bar. In *Nash*, the Court considered defendant State agency's *interpretation* of §443.06 of the Florida Unemployment Compensation Law, which by its terms disqualified an unemployment compensation claimant whose unemployment "is due to a labor dispute in active progress. . . ." 389 US at 235-236. The Florida Commission construed the words "labor dispute" in this provision to include the filing of unfair labor practices charges against a former employer. Applying this construction, the Florida Commission disqualified the unemployed plaintiff from further eligibility because she had filed such charges. This Court held unanimously that the law as thus applied conflicted with the federal policy, expressed by Congress in §8(a)(4) of the National Labor Relations Act. 29 USC §158(a)(4), that persons who report alleged unfair labor practices should be protected against coercion. 389 US at 238.

Although the defendant Commission in *Nash* could not have directly violated §8(a)(4) (just as Firestone alleges, the MESC could not directly violate Title VII), the Commission's application of the statute to deny benefits to the plaintiff Nash "frustrate[d] the enforcement of the [NLRA]" and was "invalidat[ed] under the Supremacy Clause." In so holding, Justice Black noted "we but follow the unbroken rule that has come down through the years" 389 US at 240, citing cases.[4]

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[4]

The unanimous *Nash* court stated:

> We have no doubt that coercive actions which the Act forbids employers and unions to take against persons making charges are likewise prohibited from being taken by the States. The action of Florida here, like the coercive actions which employers and unions are forbidden to engage in, has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board . . . A national system for the implementation of this country's labor policies is not so dependent on state law.

In *UAW* v *Taylor*, as in *Nash*, a federal court declared invalid a *practice* of the State employment security agency which practice was derived from that agency's interpretation of its organic legislation. In both cases, the challenged practice governed the substantive determination of benefit eligibility. In both cases, the invalidation rests on a finding of conflict with federal law. In sum, *Nash* provides persuasive precedent in support of the *Taylor* order.

The only aspect of the *Taylor* order not explicitly at issue in *Nash*, i.e., the granting of injunctive relief, was sanctioned by this Court in *California Department of Human Resources* v *Java*, 402 US 121; 91 S Ct 1347; 28 L Ed 2d 666 (1971). In *Java*, the Court held that a California statute (California Unemployment Insurance Code §1335), which required the withholding of benefits during the pendency of an employer appeal from an initial determination of eligibility, conflicted with the dictates §303(a)(1) of the Social Security Act, 42 USC §503(a)(1), that the procedures of state plans receiving federal funds "be reasonably calculated to insure full payment of unemployment compensation when due." The Court upheld the lower court's injunction against the enforcement of the state statute since the latter was "inconsistent" with federal law, and "tend[ed] to frustrate" congressional intent. 402 US at 135.

Java thus established two relevant principles. First, conflict with federal law is a ground for invalidation of state agency procedures, even if such procedures are mandated by state statute.[5] Second, further state proceedings in accordance with the invalid practice may properly be enjoined, as District Judge Joiner did in the *Taylor* order in *UAW* v *Taylor*.

It follows from *Nash* and *Java* that the District Court was

[5]

And, *a fortiori*, if they are merely derived from a statute by agency interpretation, as in *Nash, supra*, or the case at bar.

acting well within its powers when it entered its order of July 29, 1974, invalidating and enjoining a state agency practice as being in conflict with a federal statute.

C.

Conflict with Title VII constituted a valid basis for invalidation of the MESC practices.

Judge Joiner expressly found in *UAW* v *Taylor* that the MESC practice of denying benefits to women forced out of work on mandatory leaves is "unlawful or contrary to Federal law." The fact that he was not specific as to which federal law conflicted with the practice does not alter the fact that the UAW pointed to at least 4 federal laws which were violated[6] and specifically withdrew the constitutional claim before Judge Joiner ruled (Appendix below, pp 71, 72).

There is ample support in both statute and case law for the proposition that a court may strike down a state statute or practice as conflicting with Title VII of the 1964 Civil Rights Act, as amended, 42 USC §§2000e *et seq*. When faced with state statutes which purported to *require* employers to commit unfair employment practices under Title VII, the courts have not hesitated to invalidate the state laws under the Supremacy Clause. See, e.g., *Rosenfeld* v *Southern Pacific Co*, 293 F Supp 1219 (CD Cal, 1968), affd, 444 F2d 1219 (CA 9, 1971) (California statute and regulations restricting women's hours of work and imposing weight-lifting limits on female employees); *Garneau* v *Raytheon Co*, 323 F Supp 391 (D Mass,

[6]

UAW's complaint alleged that the MESC's interpretation of section 48, MESA, was contrary to section 303(a)(1) of the Social Security Act; contrary to the purposes of the Federal Unemployment Insurance Program; that it impeded Title VII of the 1964 Civil Rights Act; and impeded the operation of the National Labor Relations Act.

1971) (Massachusetts statute restricting women's hours of work); *Jones Metal Products Co* v *Walker*, 29 Ohio St 2d 173; 281 NE2d 1 (1972) (Ohio law banning women from certain jobs and restricting hours of work). Yet it is clear from an examination of Title VII itself that these precedents do not exhaust a federal court's power to invalidate discriminatory state statutes and practices.

Two sections of the Civil Rights Act address the relationship of the federal statute to state law. The intent of both sections was to save the provisions of state anti-discrimination laws, while invalidating state laws inconsistent with the federal statute. See *Rosenfeld* v *Southern Pacific Co, supra*, 444 F2d at 1226. Thus, Title VII specifically lifts the duties imposed by any state law "which purports to require *or permit* the doing of any act which would be an unlawful employment practice under this [Title]". (emphasis added), 42 USC §2000e-7. Similarly, any "provision [of State law which] is inconsistent with any of the *purposes* of this Act, or any provision thereof," is expressly declared invalid under the Civil Rights Act of 1964, by section 1104, 42 USC §2000h-4 (emphasis added). Thus, the federal courts have the power, under Title VII and the Supremacy Clause, to invalidate state laws or practices which *permit* employers to commit unfair employment practices, or which conflict with the *purposes* of Title VII.

Before examining the specific ways in which the practices of the MESC toward plaintiff's class conflicted with Title VII, two suggestions made by Firestone in its brief must be confronted.

The first is that MESC's function of paying unemployment benefits does not fall within the ambit of Title VII. It is true that one court has held that a state employment commission or similar agency is not, in its benefit-paying capacity, an entity covered by Title VII. *Vick* v *Texas Employment Commission* 514 F2d 734, reh denied, 520 F2d 944 (CA 5, 1975). However, *Vick* is irrelevant to the point at hand. Plaintiff did not seek a finding that the MESC *violated* Title VII. UAW sought, and received, from the District Court a finding that certain practices of the MESC are "contrary to Federal law," and, therefore, invalid. One of the federal laws with which the MESC practice was found to conflict is Title VII. The result of an inquiry as to whether or not the MESC, in its benefit-paying capacity, can be said to *violate* Title VII, is not dispositive of the inquiry as to whether or not certain MESC practices *conflict* with Title VII.

Secondly, Firestone implies that the Supreme Court's decision in *Geduldig* v *Aiello*, 417 US 484; 94 S Ct 2485; 41 L Ed 2d 256 (1974), immunizes MESC from attack on Title VII grounds. The short answer to this contention is that the Supreme Court's constitutional analysis in *Aiello* is irrelevant to this case, in which no Fourteenth Amendment issues were ruled upon by the single-judge District Court.[7]

It should be stressed, further, that as to entities covered by both Title VII and the Fourteenth Amendment, it is established that the former imposes greater restrictions than the latter on a state's policies which discriminate against pregnant women. *Berg* v *Richmond Unified School District*, 528 F2d 1208, 1212 (CA 9, 1975). Therefore, even if, *arguendo*, under *Vick, supra*, the MESC in its benefit-paying capacity cannot directly *violate* Title VII, it does not follow that an MESC practice is free from *conflict* with Title VII; and even if, *arguendo*, the

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[7]

Several Circuit Courts have noted that reliance on *Aiello* is "misplaced" in cases where analysis of Title VII is called for. *Wetzel* v *Liberty Mutual Insurance Co*, 511 F2d 199, at 202 (CA 3, 1975), vacated on other grounds, 424 US 737; 96 S Ct 1202; 47 L Ed 2d 435 (1976); *Hutchison* v *Lake Oswego School Dist No 7*, 519 F2d 961, 964 (CA 9, 1975).

practice is not prohibited by the Fourteenth Amendment, it may still frustrate the broader requirement imposed by Title VII.

As indicated in Point II. B. hereof, a state agency's interpretation of a state unemployment compensation law in a manner which frustrates implementation of a federal law must bow before the heavier weight of the federal law.

The actions of the MESC in the case at bar clearly fall within the rubric of practices condemned in *Nash, supra.* Here, the "coercive action" is the denial to women, solely on grounds of pregnancy, of income to which they would otherwise be entitled. Such action is forbidden to employers by Title VII. Surely the teaching of *Nash* is that the Supremacy Clause forbids MESC to "frustrate the purpose of Congress" in Title VII by denying women income to which they would be entitled but for their pregnancy. The effect on the employees in both *Nash* and in *UAW* v *Taylor* is the same: total deprivation, not only of wages, but of the statutorily mandated "substitute for wages," as punishment for activity which an act of Congress protects against discrimination. The legislative prohibition against such discrimination cannot be nullified when the state, acting under color of law, functions as a surrogate for discriminating employers.[8]

It is clear that MESC's construction of section 48, MESA,

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[8]

The MESC policy at issue here is more objectionable than the practice invalidated in *Nash*. In the latter case, the employer did not actually take the coercive action—discharge of the plaintiff for filing an unfair labor practice charge—which was forbidden by the NLRA. In the present case, the employers *did* force women out of work because of pregnancy, a practice forbidden by Title VII. The MESC's subsequent denial of unemployment compensation *compounded* the illegal discrimination practiced by the employers, rather than merely *substituting* for it, as in *Nash*.

which was challenged by plaintiffs in *UAW* v *Taylor* rewarded those employers in the State of Michigan who committed employment practices unlawful under Title VII. Some employers in the State had a policy of forcing out of work pregnant women who were nonetheless willing and able to continue working. Such policies are unlawful employment practices under Title VII. And yet, MESC's challenged construction of section 48, MESA, purported to recognize the validity of this unlawful policy.

In fact, the challenged MESC practice actually *encouraged* employers to adopt the discriminatory lay-off policy. Since the victims of pregnancy lay-offs were not eligible for unemployment compensation, the employer was relieved of its obligation to defray the costs of compensation, an obligation which was imposed on employers in the case of other involuntary lay-offs. Furthermore, since under MESA an employer's current contribution level is based in part on past rates of compensable unemployment among its employees, the MESC practice of denying compensation to victims of mandatory pregnancy lay-offs effectively lowered the "experience rating" of employers adopting such policies vis-a-vis the ratings of those employers who laid off equal numbers of employees but did not mandatorily and discriminatorily lay off pregnant employees.

In summary, the challenged MESC construction of section 48, MESA, created a financial incentive, both current and future, for employers to discriminate on the basis of sex in violation of Title VII. This construction thus encouraged, and, *a fortiori*, "permitted" the commission of unlawful employment practices by Michigan employers. Under Title VII, 42 USC §2000e-7, any "liability, duty, penalty, or punishment" imposed by such a state practice must be nullified. MESC's duty, imposed by its challenged construction of the statute, was to withhold benefits from unemployed workers otherwise eligible

for them. The District Court, by ordering the MESC to pay these benefits, was carrying out the mandate of Title VII and asserting the supremacy of federal law over a conflicting state practice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1147

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v.

S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, AND ALEX FULLER, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

BRIEF AND APPENDIX IN OPPOSITION FOR RESPONDENT INTERNATIONAL UNION, UAW

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Argument 11-36

I. The Court Of Appeals Correctly Affirmed The District Judge's Denial of Firestone's Motion To Intervene In *UAW* v. *Taylor:*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1147

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v

S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, AND ALEX FULLER, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL UNION, UAW

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,[1] by its counsel, respectfully pray that this Court *deny* the Petition for Writ of Certiorari.

---

[1]Petitioner Firestone Tire & Rubber Company, and its divisions, Hamill Manufacturing Company and Firestone Steel Products Company will all be referred to as "Firestone". Respondent Michigan Employment Security Commission and other State appellees, will jointly be called "MESC" or "the State". Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and the other plaintiffs in *UAW* v. *Taylor* will usually be called "UAW" or "plaintiffs", as required by the context.

OPINIONS BELOW

The unreported Opinion below, affirming the District Court, is reproduced in Firestone's Appendix (4a-6a).[2] The relevant District Court Orders in *UAW* v. *Taylor*,[3] are the September 20, 1973 Order as to a three Judge Court (3b-6b); the April 30, 1974 Order as to Notice to Class and Publication (7b-12b); the July 29, 1974 Final Order Granting Relief (27a-29a); the July 28, 1975 Order as to State Employees (24a-26a); and the December 12, 1975 Order Denying Intervention (19a-23a). The Court below also affirmed the District Court's Order granting defendants' motion for summary judgment, in *Firestone* v. *Taylor* (7a-8a).

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals correctly affirm the District Court's exercise of its discretion, under Rule 24, FRCP, in denying Firestone's November 14, 1975 motion to intervene in *UAW* v. *Taylor* under the following circumstances: 1) said suit was filed July 16, 1973; 2) a final judgment was entered on July 29, 1974; and 3) Respondents' uncontroverted affidavits established that: a) Firestone was given notice of said suit on August 17, 1973 and continuously since that date; b) employer interests were adequately represented by defendants; and c) Firestone's intervention

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[2] Pages of Firestone's Appendix will be cited in parenthesis as (a). Pages of Respondent UAW's Appendix and Addendum will be cited as (b). Pages of the Appendix below will be cited as (Appendix Below a or b).

[3] The first and main suit, *UAW, et al v. Taylor, et al*, 6th Cir. No. 76-1474, will usually be called *"UAW* v. *Taylor"* or *"Taylor"*. Firestone's new suit, *Firestone Tire & Rubber Co, et al* v. *Taylor, et al*, 6th Cir. Nos' 76-1966 and 1967, will usually be called *"Firestone* v. *Taylor"* or *"Firestone"*.

would have unduly delayed and prejudiced the rights of the original parties?

Respondent UAW says the answer is "Yes".

2. Did the Court of Appeals correctly affirm the District Court's grant of summary judgment dismissing Firestone's suit to set aside the judgment in *UAW* v. *Taylor* where Firestone's suit was begun over 20 months after said judgment and where Firestone failed to appeal a final State Court judgment, in *Sadro* v. *Hamill Divn. of Firestone and MESC*, which was based upon *UAW* v. *Taylor*?

Respondent UAW says the answer is "Yes".

3. Did the District Court properly grant summary judgment of Firsetone's suit to force the State to credit Firestone's unemployment insurance accounts, with the money to be paid by other employers, and Firestone's suit for a declaratory judgment that the State may not pay unemployment benefits to unemployed pregnant women?

The Court of Appeals implied "Yes".

Respondent UAW says the answer is "Yes".

4. Did *UAW* v. *Taylor* involve a case or controversy where plaintiffs complained of defendants' continued denial of unemployment insurance to certain plaintiffs and to other pregnant women?

The Courts below held "Yes".

Respondent UAW says the answer is "Yes".

COUNTER STATEMENT OF THE CASE

A Counter Statement of the Case is needed because Petitioner's "Statement of the Case" includes argument, irrelevant material not in the record, and numerous other omissions and inaccuracies. The inaccuracies and misleading statements may be corrected by facts printed in capital letters. Facts and proceedings omitted by Firestone may be printed in italics.

A. *UAW, et al* v. *Taylor, et al*

Firestone apparently does not seek *certiorari* in regard to the Court of Appeals' affirmance of the Orders in *UAW* v. *Taylor*. Firestone does, however, seek review of the affirmance of the dismissal of *Firestone* v. *Taylor*, which was its own suit to set aside *UAW* v. *Taylor*. Thus, *UAW* v. *Taylor*, although final, must be considered to evaluate properly Firestone's petition.

In *UAW, et al* v. *Taylor, et al*, plaintiffs sued to stop defendant State agencies from denying unemployment insurance to pregnant women who were forced out of work. The denials were based upon defendants' construction and application of part of Section 48 of the Michigan Employment Security Act (28a; 13b, 17b).[4] The suit did not seek unemployment benefits for any particular woman or ask that the MESA account of any employer be charged. It asked that defendants be ordered to stop automatically denying claims to women forced out of work due to pregnancy, and instead to consider each woman's individual circumstances.

Plaintiffs began *UAW* v. *Taylor* on July 16, 1973. *Though not a party, Firestone was given notice of the suit on August 171973, when a copy of the Complaint and attachments were sent to it.* (Appendix Below, 90a, 204a) *Firestone was given additional notice of that suit repeatedly thereafter.*[5]

---

[4] Michigan Employment Security Act, Mich. Stats. Ann. Secs. 17.501, *et seq.*; Mich. Comp. Laws Secs. 421.1, *et seq.*, herein cited as "MESA" or the "Act".

[5] The facts establishing notice to Firestone and other employers, adequate representation of employer interests by the State defendants, an actual controversy and harm to plaintiffs were set forth in affidavits, *not controverted by Firestone*, and in the pleadings. (Appendeces below: 1a-9a, 80a-148a, 164a-246a, 376a-385a, 412a; 3b-22b)

A pre-trial conference was held on September 13, 1973, before then Court of Appeals Judge Wade H. McCree, and then District Judges Damon J. Keith and Cornelia G. Kennedy, *because the Judges questioned the need for a three-judge court* (3b, 4b). *After that conference, plaintiff's counsel withdrew the request for a three-judge court in order "to save time" and because plaintiffs "ultimately expect to prevail on other Federal grounds; thus, the Court need not reach the equal protection issues".* (5b)

Based upon the Judges having questioned the need for a three-judge court and plaintiffs' withdrawal, *the Judges entered an Order "concluding that three judges are not required to decide the merits of the case and remanding it to a single judge "for determination of whatever other federal grounds may be presented by the complaint".* (3b, 4b)

In UAW v Taylor, plaintiffs complained of a State practice, set forth in an informal, internal MESC manual and not even promulgated in any formal MESC regulation. (12b, 13b)

On May 21, 1974, prior to the final Order in UAW v. Taylor, State defendants MESC, its members and Taylor, administratively changed their procedure to cease applying Section 48, MESA, to deny benefits to pregnant women unless such women in fact requested a leave of absence. (14b, 15b, 17b-19b)

The District Court Order of April 30, 1974 directed publication of the proposed *final Order* (8b-8b). The final Order in this suit was entered on July 29, 1974 (27a-29a).

Those Orders were entered due to a settlement in which the State defendants fully participated (11b, 12b).

The District *Court's Order* of July 29, 1974, *held that defendants' practice* prior to plaintiffs' suit was contrary to Federal law (28a). *The Order adds "This Court expressly does not rule upon the validity of Section 48, MESA, or the leave of absence portion of said Section".* (28a)

Contrary to Firestone's position, the Court of Appeals stated:

> "Judge Joiner specifically refrained from finding Section 48 of MESC (sic) unconstitutional. Rather, he found that the practices of MESC in administering the Act violated federal law." (5a)

Section 48, MESA, and the leave of absence portion of said Section was not changed due to UAW v. *Taylor.* (28a)

Firestone states that the Court Order was "totally silent" on what provision of Federal law was contravened by Section 48. THAT IS MISLEADING.

The Order expressly was based upon plaintiffs' Complaint and Motion for Summary Judgment. (27a) Said Complaint set forth several Federal laws which were impeded or violated by defendants' application of Section 48. *Plaintiffs Motion for Partial Summary Judgment and Brief were based upon these same Federal grounds.*[6]

While not mentioning the 1974 Civil Rights Act, *the Judge's Order allowed women to file claims from and after*

[6]Those Federal grounds were set forth in Firestone's Appendix below. (at pp. 22a, 42a-46a, 51a, 52a, 54a-56a, 58a-66a). They include the Complaint that a State defendant denied benefits to union members but granted them to non-union members, under the *same* contracts. The UAW claimed this impeded the NLRA.

July 1, 1965, the effective date of said Act, and required defendants affirmatively to reopen claims back to April 5, 1972, the date the EEOC's Title VII Guidelines were published. (5a, 28a, 29a; 7b-11b)

On August 30, 1974, an Order was entered in Sadro, et al v. *Hamill Mfg. Divn. of Firestone & MESC,* Ingham Cir. Mich. No. 15738-C. (22b, Appendix Below, 200a, 201a) *This State Court Order reversed the agencies' denials of benefits to Firestone's employees and remanded their claims for consideration based on UAW* v. *Taylor.*

BY ORDER OF JULY 28, 1975, THE DISTRICT COURT REJECTED THE MESC'S POSITION ABOUT SAID DEFENDANTS' STATE EMPLOYEES AND HELD THAT THEY WERE COVERED BY THE 1974 ORDER. (24a-26a)

FIRESTONE FALSELY STATES THAT THE JULY, 1975 ORDER APPLIED TO ITS EMPLOYEES AND THAT SAID 1975 ORDER EXTENDED THE SCOPE OF THE FINAL ORDER OF JULY, 1974. The District Judge held otherwise (25a).

FIRESTONE FALSELY STATES THAT UNTIL JULY, 1975, IT HAD NO REASON TO BELIEVE THAT MANY OF ITS EMPLOYEES WOULD BE BENEFITTED BY THE ORDER, BECAUSE IT THOUGHT THAT THE MESC WOULD NOT PAY BENEFITS TO WOMEN WHO WERE FORCED OUT OF WORK PRIOR TO APRIL, 1972. THE DISTRICT JUDGE,

BASED UPON UNCONTROVERTED AFFIDAVITS[7], FOUND THAT FIRESTONE HAD AMPLE NOTICE THAT ITS EMPLOYEES WOULD BE BENEFITTED BEFORE 1972 (20a; 7b-12b)

Firestone sought to intervene on November 17, 1975. (4a) The District Court denied Firestone's motion to intervene in an Order of December 12, 1975, expressly finding that Firestone had knowledge and notice of this suit through its entire proceedings. (20a)

The Court of Appeals affirmed the District Court's decision not to let Firestone intervene (5a).

The only issue technically before this Court is whether the Court of Appeals erred by holding that the District Court did not abuse its discretion in denying Firestone's motion to intervene under Rule 24, FRCP.

---

[7] The UAW affidavits showed, in part that, *beginning in September 1974, the MESC issued individual determinations against Hamill Division of Firestone, based upon UAW* v. *Taylor and said MESC Instructions.* (Appendix Below, 232a) *Hamill's Corporate Labor Relations Director was aware of such MESC actions and indicated that he was displeased with them as far back as October 7194. (Ibid)* Firestone, by its counsel, was litigating individual claims (based on *UAW* v. *Taylor*) in March 1975, four months before Firestone pretends it realized that it was affected and eight months before it sought intervention. (50b, 51b)

FIRESTONE FURTHER MISLEADS THIS COURT BY STATING THAT DEFENDANT MESC HAD ISSUED INSTRUCTIONS WHICH EXCLUDED WOMEN PRIOR TO APRIL 5, 1972. NINE DAYS LATER, ON *AUGUST 30, 1974*, THE *MESC* BEGAN OBEYING THE COURT ORDER BY ISSUING REVISED INSTRUCTIONS; *THOSE INSTRUCTIONS, AND A NOTICE TO EMPLOYERS, SENT WITH SAID MESC INSTRUCTIONS, EXPRESSLY PROVIDE THAT CLAIMANTS UNEMPLOYED FROM AND AFTER JUNE 30, 1965 WERE COVERED BY THE 1974 COURT ORDERS.* (19b, 20b) *THE MESC INSTRUCTIONS OF AUGUST 30, 1974 WERE ISSUED AFTER A MEETING OF THE COMMISSION, INCLUDING EMPLOYER REPRESENTATIVES.* (Appendix Below, 81a-83a) 83a)

B. *Firestone* v. *Taylor, et al*

On March 31, 1976, while its *UAW* v. *Taylor* appeal was pending, Firestone filed a new suit. Here, Firestone attempted to set aside the July 29, 1974 judgment in the earlier suit,[8] *UAW* v. *Taylor,* and to have the District Court issue a declaratory judgment in opposition to that issued in *UAW* v. *Taylor,* on the grounds that: 1) a three-judge court was required in said *UAW* v. *Taylor,* and 2) the *UAW* v. *Taylor* judgment was contrary to law on the merits of the substantive issues (14a-17a).

Firestone also asked the Court to enjoin the State from including in its calculations of the amount Firestone is assessed under the MESA, benefits paid to women placed on maternity leave by Firestone and to credit Firestone's MESA account for any amounts charged against it by the State due to *UAW* v. *Taylor.* (17a, 118a) In the Coutr below, *Firestone admitted that if it prevails in having its MESA account credited, "these amounts [will] be made up by all employers in Michigan".* (Firestone Court of Appeals Brief, note 8, p. 20; 53b)[9]

Respondents filed motions for summary judgment which were supported by affidavits and other material. (20b-26b); Appendix Below 401a-412a) *Firestone filed no counter-affidavits.*

On June 17, 1976, the District Court granted defendants' motion for summary judgment and dismissed Firestone's new suit. (7a-9a) The Court of Appeals affirmed. (5a, 6a).

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[8] Firestone's Complaint deals with the 1974 Order, which Firestone pretends did not affect it (13a-15a). See *supra,* at pp 7, 8.

[9] Firestone did not join any such employers other than Respondents MESC and UAW.

SUMMARY OF ARGUMENT

The decisions of the Court below were procedural and were based upon factual findings peculiar to this case. Neither such procedural rulings nor any ruling on the merits present important questions. Such holdings are in accord with recent decisions of this Court and with the decisions of all Circuit Courts, which have considered the issues.

The District Court properly denied Firestone's motion to intervene in *UAW* v. *Taylor* because of its untimeliness and because Firestone's interests were adequately represented. Firestone's new suit, which was brought to set aside *UAW* v. *Taylor*, was properly dismissed because it was begun over one year after the final Order in *Taylor*. Firestone's new suit was barred because of a final State Court order in a case against Firestone involving the same issues.

Firestone may not compel the State to credit its unemployment insurance account at the expense of other employers. Firestone's request for a declaratory judgment that Federal law does not require the State to pay benefits to pregnant women is moot because the State voluntarily ceased that practice prior to any final order in *UAW* v. *Taylor*. The decisions below are in accordance with the construction of the Michigan Statute by Michigan Courts. This case is not important because Federal law was changed in 1976 to clearly bar the practice which the State had voluntarily stopped in 1974.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT JUDGE'S DENIAL OF FIRESTONE'S MOTION TO INTERVENE IN *UAW* v. *TAYLOR*:

AN EMPLOYER MAY NOT INTERVENE AS A DEFENDANT IN A SUIT AGAINST STATE AGENCIES WHERE: 1) SAID STATE DEFENDANTS INCLUDE EMPLOYER REPRESENTATIVES AND THE STATE ADEQUATELY REPRESENTED DEFENDANTS' AND EMPLOYER INTERESTS; 2) THE EMPLOYER HAD ACTUAL KNOWLEDGE OF AND RECEIVED NOTICE OF THE SUIT DURING ITS PENDENCY AND MORE THAN TWO YEARS BEFORE ITS MOTIONS WERE FILED, HAD NOTICE OF WHEN JUDGMENT WAS ENTERED AND HOW SUCH JUDGMENT AFFECTED IT; 3) THE PURPORTED INTERVENOR WAS NOT AN INDISPENSABLE OR NECESSARY PARTY TO THE SUIT; 4) ITS INTERVENTION WILL HARM EXISTING PARTIES AND OTHERS; AND 5) INTERVENTION WOULD NOT CHANGE THE RESULT IN THE CASE.

The Court of Appeals affirmed the District Court's denial of Firestone's motion to intervene in *UAW* v. *Taylor* (4a-6a). The Court below also cited Firstone's untimely attempt to intervene in *Taylor* as a reason for dismissing Firestone's new suit. (5a, 6a)

Firestone does not seek review of the denials of intervention and it does not expressly argue that issue in its petition. However, its not being allowed to intervene relates to and defeats its Arguments III, II and even I.

In regard to intervention, the Court of Appeals states:

> ". . . Final judgment in *UAW* v. *Taylor* was entered by agreement of the parties on July 29, 1974.

Firestone's motion to intervene was filed November 17, 1975.

In denying the motion to intervene for lack of timeliness the district court found that Firestone had "informal and actual notice" of the July 29, 1974 judgment and a subsequent order entered July 28, 1975. This finding is amply supported by the record. The district court found that Firestone was neither a necessary nor an indispensable party to *UAW* v. *Taylor*, which involved the validity under federal law of the practice of MESC of denying unemployment compensation to employees in Michigan who were forced to take leaves of absence due to pregnancy. We find no such compelling circumstances in this case as would require the district court to permit intervention after entry of final judgment. The district court did not abuse its discretion in denying intervention." (Citation Omitted, 4a)

That holding affirmed the discretion of the District Judge, based upon uncontroverted facts in this record. The Court of Appeals was correct.

This issue is certainly not important for this Court to consider. The denial of intervention is in accord with decisions by this Court and by Courts of Appeals.[10]

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[10] See, for example: *NAACP* v. *New York*, 413 U.S. 345, 365-367 (1973); *Chase Manhattan Bank (N.A.)* v. *Corp. Hotelera de Puerto Rico*, 516 F.2d 1047, 1049 (1st Cir. 1975); *Commonwealth of Pennsylvania, et al* v. *Rizzo, et al*, 530 F.2d 501, 505 (3d Cir. 1976); *Black* v. *Central Motor Lines, Inc*, 500 F.2d 407, 408 (4th Cir. 1974); *US* v. *United States Steel Corp*, 548 F.2d 1232, 1235 (5th Cir. 1977); *EEOC* v. *United Airlines, Inc*, 515 F.2d 946, 949 (7th Cir. 1975); *Nevilles* v. *EEOC*, 511 F.2d 303, 305 (8th Cir. 1975); and *Spangler* v. *Pasadena City Board of Educ*, 427 F.2d 1352, 1355 (9th Cir. 1970). The District Court relied upon this Court's decision, in NAACP, *supra*. (20a)

This Court very recently denied motions to intervene by Republic Steel and U.S. Steel Corporations, though their employees were involved. *Ohio Bureau of Empl. Services* v. *Hodory*, 429 U.S. 814 (1976). The Ohio Bureau, the agency comparable to the MESC, defended that case.

In its Argument III, Firestone argues that the defendants did not adequately represent its interests.[11] This is properly considered under the intervention issue. Rule 24(a)(2) and (b)(2), F.R.C.P.

In this regard, the Court of Appeals correctly rejected Firestone's argument:

> "Finally, Firestone fails to allege facts suggesting that its interests were not adequately represented. Courts have recognized that '. . . a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee.' (citations omitted). MESC has the authority to promulgate rules and regulations to carry out the provisions of the Act, M.C.L.A. §421.4; two of its four voting members represent employer interests, M.C.L.A. §421.3. Firestone does not claim that MESC acted in bad faith. Indeed, the record reveals competent representation by the Commission. That its efforts culminated in a consent decree is not evidence *per se* of inadequate representation." (5a, 6a)

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[11] The burden was on Firestone to prove inadequate representation by existing parties. *Blanchard* v. *Johnson*, 532 F.2d 1074, 1077 (6th Cir. 1976), affirming denial of intervention and relying upon *Afro American Patrolmen's League* v. *Duck*, 503 F.2d 294, 298 (6th Cir. 1974); and *Commonwealth of Pennsylvania* v. *Rizzo*, 530 F.2d 501, 505 (3rd Cir. 1976).

The above ruling by the Court of Appeals was in accord with comments by the District Judge that the State had adequately represented employer interests.

FIRESTONE MISLEADINGLY STATES THAT "THE STATE'S COUNSEL HAD CONCEDED THAT IT DID NOT REPRESENT EMPLOYER'S INTERESTS". The Assistant Attorney General merely stated during argument that *his office* represents "the State and the Commission. . . and no employers necessarily." (at p. 23 of Firestone's Brief) Earlier, he stated that an association of manufacturers had representatives at MESC meetings. (Appendix Below, 304a)

Respondents uncontroverted affidavits (filed in both suits) established that: 1. Defendant MESC was and is an "employer" under the MESC and had its own accounts charged due to *UAW* v. *Taylor;* 2. the MESC, by statute, represented employer interests (6a); and 3. *the eight person MESC Advisory Council included four employer representatives.*[12] (Section 3a, MESA)

Firestone, having chosen not to contest such affidavits, should not here (for the first time) complain that summary judgment was entered against it.

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[12] In 1969 and thereafter, the following employer representatives were members of the MESC Advisory Council: Colin L. Smith, Employer Unemployment Compensation Council, and then his successor, director of the EUCC; M. Jane Kay, Detroit Edison Company; Brice B. Maddox, Gardner-Denver Company; and Joseph A. Reilly, Ford Motor Company. (82a) A case in which the MESC, as the employer, had its accounts charged due to *UAW* v. *Taylor* is included in the Addendum. (48b, 49b)

THIS WAS NOT A COLLUSIVE LAWSUIT.[13] THE STATE CONTESTED THIS SUIT by filing a Motion to Dismiss and a Brief. (Appendix Below, 10a-21a)

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[13] Respondent's affidavits and Complaint established that this suit was not collusive (Appendix Below, 167a, 165a). Firestone cites the second Michigan Court of Appeals opinion in Rozankovich v. Kalamazoo Spring Corp., 44 Mich. App. 426, 205 N.W.2d 311 (1973). Assuming, *arguendo*, that the Michigan Court may have said (in *dictum*) that it is not wise for courts to invalidate statutes in uncontested and non-adversary cases, that is not what happened in UAW v. Taylor. In UAW v. Taylor, the parties did not agree or stipulate that the law was unconstitutional. Section 48 was not voided in UAW v. Taylor, and the Court did not even rule that its application was unconstitutional. (208a)

In its earlier Rozankovich opinion, 41 Mich. App. 717, 200 N.W.2d 719 (1972), the Court reversed the denial of benefits to a plaintiff, who had been placed on maternity leave, because it was not shown that the particular collective bargaining contract "obligated Mrs. Rozankovich to accept against her will a leave of absence which she did not request." (at 718)

Later, after Rozankovich was decided by the State Court of Appeals, the *winning* plaintiff filed a delayed application for rehearing asking that the Court of Appeals invalidate the Section 28(1)(c) pregnancy proviso. (44 Mich. App. at 427) The Court could properly have refused to invalidate the Section 28 proviso because the issue had not been raised below and because plaintiff, in fact, had relied on Section 28 before the lower court and agencies.

Rozankovich does not help Firestone. Contrary to Firestone's brief, the State Court did not advise or hold that the Attorney General and private parties could never settle cases or enter consent judgments in suits involving the MESA. Moreover, such advice or "admonition", which Firestone claims was ignored in UAW v. Taylor, would not bind a Federal Court.

Ironically, about one month after the Court of Appeals failed to rule in Rozankovich, the Michigan Circuit Court, in Goodman v. Chrysler, on motion by claimant and with the expressed non-opposition by lawyers for Chrysler and the MESC, did invalidate the pregnancy provision in Section 28, because it conflicted with Federal law and denied equal protection of the law. Goodman, 6 CCH Un. Ins. Reps. Mich. ¶ 9341 (Wayne County, Mich. Cir. Ct. No. 208, 538, 1973) is here cited by Firestone and is included in the Addendum to UAW brief. (33b-37b) Firestone and other employers were bound by Goodman, though they were not parties, because the State agencies applied Goodman as the law in Michigan.

If, as Firestone here urges, the Michigan Courts' views on Federal law are to bind Federal courts, then Firestone's argument is self-defeating. The State Court, in Goodman, did void the pregnancy provision, in Section 28, without any opposition by Chrysler or the MESC.

Only after and as a direct result of this Court's decision in Cleveland Board of Educ., v. *LaFleur,* 414 U.S. 632 (1974), *did defendants agree to a judgment in this case. This was a settlement.* (11b)[14]

II. THE COURT OF APPEALS CORRECTLY HELD THAT FIRESTONE COULD NOT OBTAIN RE-EXAMINATION OF THE ISSUES IN *UAW* v. *TAYLOR* THROUGH ITS NEW SUIT

This discussion corresponds with Firestone's Argument II.

A. Procedurally, Firestone's Suit to Set Aside *UAW* v. *Taylor* Was Properly Barred Because It was Begun Over One Year After The Final Order in Taylor

Firestone's March 31, 1976 Complaint (9a) sought to set aside the July 29, 1974 Order in *UAW* v. *Taylor.* (13a-15a)

In District Court, Firestone admitted that it may have no relief under Rule 60(b)(1), (2) and (3), FRCP, because it filed more than one year after the 1974 Order was entered. However, Firestone asked the District Court to invoke Rule 60(b)(4) and (6) to relieve Firestone from the effects of said Court's order. The District Court correctly refused to do so. (6a)

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[14] Plaintiffs conceded the following: 1) plaintiffs dropped their claim that Section 48, MESA, was unlawful on its face. (28a; Appendix below, 76a, 72a, 313a); 2) While women could file claims for unemployment back to July 1, 1965, the MESC was only required to affirmatively search its files and mail notices to women class members back to May 1, 1971, and to automatically reopen claims from April 5, 1972. (20a, 21a, 28a, Appendix Below, 76a, 307a, 369a, 380a-384a) 3) plaintiffs dropped their claim for lost time and money for certain plaintiffs (Complaint, Para 6; Appendix below 3a); and 4) plaintiffs dropped their claim for attorneys fees and costs. (Prayer V; Appendix Below, 8a) Appendix B, the notice to the class, refers to a "compromise" and a "settlement". (11b)

Rule 60(b)(4) does not help Firestone because the Court's Order was not and is not void. (5a)

The District Court's jurisdiction is apparent from the Complaint in *UAW* v. *Taylor.* The UAW's Brief for Summary Judgment cited Federal cases throughout the country, involving the State agencies as defendants, and requesting similar relief.

Firestone may not avail itself of Rule 60(b)(6), because Firestone is time-barred from relying upon any part of Rule 60(b). A motion under Rule 60(b)(6) must be made "within a reasonable time". The facts and law which establish Firestone's untimeliness under Rule 24 also establish its untimeliness under Rule 60(b)(6). See discussion, *supra,* at pages .

Moreover, if a motion falls within the reasons stated in Rule 60(b)(1), (2) and (3), the one-year period applies even if a party expressly relies upon Rule 60(b)(6).[15]

B. Firestone is Barred From Altering the 1974 Court Order Because of the Ingham Circuit Court Order in *Sadro, et al* v. *Hamill Division of Firestone & MESC.*

In August 1973, Firestone was served with a copy of the Claim of Appeal in *Sadro, et al* v. *Hamill Division of*

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[15] See, for example, Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 701, 702 (2d Cir. 1972), *cert.* denied 409 U.S. 883, *rehearing denied,* 409 U.S. 1029 (1972), which held that Rule 60(b)(6) could not be invoked to circumvent the one-year limitations under 60(b)(1).

See also *Rader* v. *Cliburn,* 476 F.2d 182 (6th Cir. 1973), which involved a District Court decision which ordered the election of members of the Board of Education for concurrent terms. Plaintiffs, not parties to the earlier suit, brought an action to "correct" the earlier Order because it allegedly was contrary to a Tennessee Statute requiring members to be elected for staggered terms. The Court held that plaintiffs could get no relief under Rule 60(b)(6) or through an independent suit in equity, because there were no "unusual and exceptional circumstances" which could justify disturbing the prior Order.

Firestone and MESC, Ingham Cir. No. 15738-C.(b)[16] It chose not to appear.

On August 30, 1974, an order was entered in said State court case, reversing the State agencies' denial of unemployment insurance to Firestone's employees, who had been forced out of work due to pregnancy. (22b) The State court order was expressly based upon the court's July 29, 1974 Order in *Taylor*. The State court, thus held that the district court had jurisdiction in *Taylor,* that the district court acted properly and the State courts were bound by *Taylor.* Firestone is bound by all of said holdings.

Firestone's Federal suit to set aside *UAW* v *Taylor* was barred, by *res judicata* or collateral estoppel. It cannot re-litigate in Federal Court what was decided by the Ingham Circuit Court. If Firestone was displeased with the Ingham Circuit Court Order, then it should have sought rehearing in that court or appealed to the Michigan Court of Appeals.

It is the general rule that parties to a State court proceeding, who later become parties in a Federal court, are bound by the determination of issues litigated and by any judgment entered by that State court. Firestone is so bound both under Federal statutory law and case law.[17]

[16] The *Sadro* material and affidavits establishing service on Firestone were part of the record below. (166a, 167a, Exh. 1; 171a, 172a, 304a; Exh. 11, 200a, 201a, 404a-412a; 22b-23b)

[17] The Ingham Circuit Court Order must be given "full faith and credit." Title 28, U.S.C.A. Section 1738. And see International Association of Machinists, Local Lodge No. 1038 v. Jeffrey Galion Mfg. Co., 350 F.2d 512, 513 (6th Cir. 1965), *cert.* denied, 383 U.S. 927 (1966); Thomas et al v. Consolidation Coal Co., et al, 380 F.2d 69, 75 (4th Cir. 1967), cert den, 389 U.S. 1004 (1967), and Rhodes v. Jones, 351 F.2d 884, 885, 886, 889 (8th Cir. 1965)). Compare Domozik v. Cohen, 413 F.2d 5 (3rd Cir. 1969); and Hicks v. City of Los Angeles, 240 F.2d 495 (9th Cir. 1957). Collateral estoppel was discussed by this Court in Ashe v. Swenson, 397 U.S. 436, 443 (1970). And see United States 1. Fusco, 427 F.2d 361, 362 (7th Cir. 1970), and Turner v. Mahar, 423 F.2d 258, 259 (6th Cir. 1970).

At the very least, the *Sadro* v. *Firestone* suit provided Firestone with additional notice of *UAW* v. *Taylor.* It refutes Firestone's claim that it did not know that its own employees were affected before 1975.

The Court of Appeals correctly held that Firestone could not, in its second suit, do what its untimeliness prevented it from doing in *UAW* v. *Taylor.* (6a) Such rulings were based upon the undisputed facts. They are not sufficiently important for this Court to review.

III. THIS PETITION RAISES NO IMPORTANT SUBSTANTIVE ISSUES: FIRESTONE IS NOT ENTITLED TO INJUNCTIVE RELIEF OR TO A DECLARATORY JUDGMENT THAT FEDERAL LAW DOES NOT REQUIRE THE MESC TO PAY BENEFITS TO PREGNANT WOMEN WHO WERE FORCED ON MANDATORY MATERNITY LEAVES.

Firestone does not seek certiorari from the Court of Appeals affirmance of the District Court in *UAW* v. *Taylor.* If this Court examines Firestone's Complaint in its own suit, it must be considered in light of the finality of *UAW* v. *Taylor.*

Firestone asks that the MESC credit Firestone's accounts, with money to be made up from all other employers. (53b; Prayers 4 and 5, 17a).[18] Firestone also asks the Court to enjoin the parts of the MESA, under which the MESC charges employers' accounts when claimants

[18] Those employers would include: a. GM and defendant agencies, which also forced women out, but have now had their own MESA accounts charged; and b. employers which never forced any women on maternity leave. Either of those results, or recovering moneys paid to plaintiff class members, would be inequitable.

receive benefits. (Prayer 3; 17a)[19] There is no basis for such relief under Michigan or Federal law. In any event, the *failure* to allow Firestone such strange relief does not raise any important issues. The decisions below do not conflict with applicable State law. (Supreme Court Rule 19.1 (b).

Firestone's request for a declaratory judgment, that the law does not require the State defendants to pay unemployment benefits to women forced out due to pregnancy, is moot. The State voluntarily ceased its policy denying benefits to such women on May 31, 1974, after *UAW* v. *Taylor* was filed. (14b, 15b, 17b, 18b)

The issue has no future implications for Firestone. Firestone ceased forcing pregnant women out of work in 1972 and in 1973. (Complaint, Section 14; 12a; Firestone Brief, p. 6)

In *UAW* v. *Taylor*, plaintiffs noted that, as a result of the April, 1972 EEOC Guidelines and the Court of Appeals decision, in *LaFleur*,[20] Michigan employers generally had, in 1972 and 1973, eliminated or refused to enforce mandatory maternity leave clauses in contracts. This is in sharp contrast to the denial of sickness and accident pay to pregnant women, where many major employers challenged those Guidelines before the EEOC and in the Courts.[21]

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[19] Ironically, Firestone did not ask for a three judge court, though basing its Complaint on the 5th and 14th Amendments of the U.S. Constitution (Para. 27, 16a)

[20] LaFleur v. Cleveland Board of Education, 465 F.2d 1185 (6th Cir. 1972), affirmed, 414 U.S. 632 (1974).

[21] Such employers included General Electric (429 U.S. 125, 1976), Chrysler, Ford and General Motors.

A. The Courts Below Did Not Hold That the State's Denial of Benefits Directly Violates Title VII

Firestone, in its Argument I.A. speculates that the Court below directly held that the MESC violated Title VII of the 1964 Civil Rights Act. Firestone then flails its "straw issue".

Plaintiffs, in *UAW* v. *Taylor*, did not bring a Title VII suit for backpay and other relief.[22] Nor did the Courts below hold that the MESC directly violated Title VII.

Plaintiffs contended and the Courts below held that the MESC's *construction* of Section 48, MESA, impeded certain Federal laws and were contrary to others. (See note 6, supra, pp. 6, 7)[23]

B. This Court Has Recently Held That It Is Unlawful To Deny Unemployment Insurance To Pregnant Women Who Are Able To Work; That Ruling Was In Accord With Prior Federal Decisions.

This Court and other courts hold that it is unlawful to deny unemployment insurance to a woman who was forced out of work due to pregnancy, without regard for such woman's individual ability to work. *Turner* v. *Dept. of Emp. Sec. of Utah*, 423 U.S. 44 (1975).[24] This Court held that

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[22] Nor did Nash v. Florida Industrial Commission, 389 U.S. 235 (1967) hold that Florida committed an unfair labor practice under the NLRA.

[23] Thus, there is no conflict between the Sixth Circuit decision and Vick v. Texas Employment Commission, 514 F.2d 734, *reh. den.* 520 F.2d 944 (5th Cir. 1975). Moreover, Vick did not hold that the *practices* of State agencies could never be stopped where they impede Federal laws.

[24] Turner is especially significant, because this Court summarily reversed the Utah court. Firestone sought to intervene in UAW v. Taylor just before this Court decided Turner. Firestone's post-Turner tenacity is not admirable.

Turner was "virtually identical" to *LaFleur, supra.* (at 46) This Court stressed that pregnant women cannot automatically be denied unemployment insurance for fixed periods of time. (at 46) Eligibility for such benefits must depend upon each woman's individual circumstances. In *UAW* v. *Taylor,* the State had automatically denied benefits to women for fixed periods due to said unlawful mantory maternity leave policies.

Prior to *Turner, supra,* other courts had held that it was unlawful to deny unemployment insurance to women due to pregnancy.[25]

Although Turner was based upon the due process clause of the Constitution, the "fair hearing" and when "due" provisions of Section 303(a) of the Social Security Act provide similar guarantees to pregnant women, denied unemployment insurance without regard for their individual abilities to work.[26]

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[25] See, e.g., Jordan v. Meskill, ... F. Supp. ....., CCH Un. Reps. Fedl. ¶ 21, 420 (D. Conn. 1973), aff'd, Jordan v. Fusari, 496 F.2d 646, 647 (2nd Cir. 1974), but *remanded* on issue of attorneys fees; Hanson v. Hutt, 83 Wash. 2d 195, 517 P. 2d 599, 1973); Stickel v. Mason, ... F. Supp. ....., CCH Fedl. Un. Ins. Reps. ¶ 21, 415 (D. Md. 1973); Lasko v. Garnes, Administrator, ... F. Supp. ....., CCH Fedl. Un. Ins. Reps. ¶ 421 (N.D. Ohio 1973); Goodman v. Chrysler and MESC, CCH Un. Ins. Reps. ¶ 9341 (Wayne Cir. Mich. No. 208 538, 1973); and Heier v. Dept. of Industry. 11 CCH Un. Ins. Reps. ¶ 8637 (Wisc. Cir. Ct. 1973). Goodman is in the Addendum. (33b-37b)

See also Sylara v. Industrial Comm. et al, ... Colo., ..., 550 P.2d 868, 870 (1976), relying upon LaFleur and Turner, supra. There were similar rulings by State Attorney Generals in Michigan, Tennessee and Oklahoma. (12b, 13b, 45b-48b, 52b)

[26] 42 U.S.C.A. Section 503(a)(1) and (3). Compare Smith v. District Un. Comp. Bd., 435 F.2d 433, 437, 438 (D.C. Cir. 1970), and California Dept. of Human Resources Development v. Java, 402 U.S. 121, 132, 133 (1971).

C. The Lower Court Decisions May Be Justified Merely By Construing The Michigan Statute As a Michigan Court Did And As The MESC (Due to *UAW* v. *Taylor*) Finally Did. Such State Construction Does Not Present Important Questions For This Court.

All employees, men and women, are denied unemployment benefits when they are *not able* to work. Thus, the MESC applied Section 48 only against women who *could* work. (13b, 14b, 17b-19b)

Michigan Courts, prior to *UAW* v. *Taylor,* had held that it was contrary to the purposes of the Michigan Statute to deny benefits to women forced out due to pregnancy. *Goodman* v. *Chrysler & MESC* 6 CCH Un. Ins. Reps. Section 9341 (Wayne Cir. Mich. No. 208 538, 1973), and *Mileff* v. *MES Appeal Board,* CCH Un. Ins. Reps. Section 8764 (Wayne Cir. Mich. No. 304-515, 1960).[27]

In *Mileff, supra,* the Court held that the leave of absence part of Section 48 could not be construed to deprive a women of benefits, after delivery of her baby, when she physically could return to work. (39b) The State defendants here did not follow *Mileff*. Plaintiffs, in *UAW* v. *Taylor,* had long urged defendants to properly construe Section 48; their refusal led to *UAW* v. *Taylor*. (Appendix Below, 86a-88a; 165a, 166a; 171a-196a)

Other State Courts had similarly construed their sta-

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[27] Both opinions, which are reproduced in the Addendum (*infra,* 33b-45b) are by highly respected Michigan jurists.

tutes not to deny benefits to women forced out due to pregnancy.[28]

In *UAW* v. *Taylor*, the State's actions were unlawful as contrary to the policies of the Federal Unemployment Insurance Program, without even reaching any sex discrimination issues. That is because they denied unemployment insurance to employees, who were forced out of work without remuneration when they were physically able and available to work.[29]

The *Michigan* Courts held that the MESC's practices were contrary to Michigan and to Federal law. The MESC voluntarily stopped denying benefits to pregnant women in May, 1974. (14b) Thus, it is Firestone's new suit, and not the decisions below, which conflicts with State law. (Supreme Court Rule 19.1.(b)).

This Court has recently held that States generally decide which involuntarily out of work employees may receive unemployment benefits.[30] Thus, Firestone may not force

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[28] See, for example: Harwood v. Employment Sec. Comm., 16 Ariz. 64, 490 P.2d 1192 (1971); Myerson v. Board of Review, 43 N.J. Super 196, 128 A.2d 15 (App. Div. 1957); Smith v. Unemployment Comp. Bd. of Rev., 393 Pa. 557, 154 A.2d 492 (1959); and Douglas Aircraft Co. v. Calif. Un. Ins. App. Bd., 180 Calif. App. 2d 636, 642, P.2d (1960). As the court said, in Myerson, *supra:* "Unemployment compensation is not to be denied persons merely because the employe or the collective bargaining agreement designates a period of unemployment as a leave of absence . . ." (128 A.2d at 17)

[29] See, for example Goodman v. Chrysler Corp. and the MESC Manua,l 12b, 13b, relying in part on the Opinion of the Michigan Attorney. Both said decision and Opinion were partly based upon U.S. Dept. of Labor Letter No. 1097 (Dec. 31, 1970). (34b) (Reproduced in Addendum, 32b-33b). Note Tennessee Opinion. (52b)

[30] Ohio Bureau of Employment Services v. Hodory, 52 LE2d 513, 523, 524 (1977). This Court did note that the Ohio Statute did not involve any fundamental interest or affect with particularity any protected class. 52 L.E.2d at 527.

Michigan to construe and apply its Statute to deny benefits to unemployed pregnant women.

D. Contrary to Firestone's Petition, This Case Is Not a Desirable Vehicle For Consideration of Whether Forcing Women Out Due To Pregnancy Violates Title VII Of The Civil Rights Act.

The Law Is Clear That Forcing Women Out Due To Pregnancy Is Unlawful.
The Decisions Below Do Not Conflict With *Gilbert* or *Satty*.
This Case Is Not Appropriate For Consideration Of Whether the Supremacy Clause Was Expanded.

Firestone alleges in its new suit, as it unsuccessfully argued to the District Court in *UAW* v. *Taylor*, that it is lawful to force women out of work due to pregnancy, without regard to their individual abilities to work.

As indicated in Arguments I, II, III. A., B. and C., *supra*, the District Court properly granted Respondents' motions for summary judgment of Firestone's suit. Those grounds for dismissal need not involve Firestone's said Argument I. 3.1. *UAW* v. *Taylor* involved the denial of unemployment insurance to pregnant women. It only indirectly concerned the validity of such employment practices under Title VII of the Civil Rights Act.[31] No party in *UAW* v. *Taylor* was held liable for violating Title VII. Thus, this Petition does not directly present the issue which Firestone wishes this Court to consider.

Moreover, this Court and others *have* decided Firestone's Argument I.B.1. against Firestone; it *is* unlawful, under Title VII and the Constitution, to force women out of work

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[31] Of course, this Court, in Turner, based its holding as to unemployment insurance on LaFleur; and LaFleur held it unlawful for a School Board to force pregnant teachers out of work.

due to pregnancy regardless of their individual abilities to work.[32]

The class of plaintiffs, in *UAW* v. *Taylor,* included women who were fired and laid off due to pregnancy (28a, 25a, 21a) and it included employees of the State. (24a). Thus, loss of seniority cases *(Satty)* and cases based upon the Constitution *(LaFleur)* support Respondents.

The UAW knows of no other employer which shares Firestone's view that such conduct is lawful. Even Firestone changed its policies afte rthe 1972 EEOC Guidelines, 29 C.F.R. Sec. 1604.10, published April 5, 1972. (Firestone Brief, p. 6 and para. 14 of the Complaint, 12a)

The decisions below do not conflict with *Geduldig, Gilbert,* or *Satty.*[33] *Gilbert* and *Satty* (in part) were *private disability* cases. *Geduldig* was a state *disability* case. In *Geduldig,* this Court partly relied upon the fact that covering

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[32] See, for example: Cleveland Board of Educ. v. LaFleur, 414 U.S. 632 (1974), *aff'g* 465 F.2d 1184 (6th Cir. 1972); Nashville Gas Co. v. Satty, U.S. , 54 LE.2d 356 (1977) *aff'g* and *rev'g* 522 F.2d 850 (6th Cir. 1975). While Satty is mainly a disability insurance case, the Court's affirmance of the back pay award to plaintiff (at 855) clearly is a holding that it is unlawful to force women out due to pregnancy. This Court affirmed the Sixth Circuit as to the loss of seniority portion of the case (54 L.E. 2d, at 362-3); Singer v. Mahoning County Bd. of Mental Retardation, 379 F. Supp. 986, 989 (N.D. Ohio, 1974), *aff'd* as to damages and attorneys fees because the employer admitted that forcing women out after the fifth month was unlawful, 519 F.2d 748, 749 (5th Cir. 1975); and Paxman v. Wilkerson, 380 F. Supp. 422 E.D. Va. 1975), *appeal dismissed,* 502 F.2d 1163. (4th Cir. 1975) See also Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976), holding that a Marine regulation requiring pregnant women to be discharged denied equal protection of law (citing LaFleur; at 1122) and violated the due process clause (citing Turner; at 1124); and Jacobs v. Martin Sweets Co., 550 F.2d 364, 370 (6th Cir. 1977), citing LaFleur.

[33] Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric v. Gilbert, 429 U.S. 125 (1976) and Nashville Gas Co. v. Satty, U.S. , 54 L.E. 2d 356 (1977).

normal pregnancies would increase the costs to the same low income persons intended to be benefited by the disability plan.

Plaintiffs here, as in *LaFleur, Turner,*[34] and *Satty, supra,* lost their jobs when they were physically able to work. *Turner,* which relies upon *LaFleur,* holds that the automatic denial of unemployment insurance to such persons is unlawful. Thus, this Court relates unemployment insurance to lost employment and does not treat it as mere sick pay for someone who has temporarily left work of her own accord.

Firestone, in its Argument I. B. 2., claims that the Court below expands the Supremacy Clause by extending the doctrine of *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967). Although plaintiffs cited *Nash,*[35] neither the Court of Appeals nor the District Judge relied upon *Nash.* (4a-8a, 19a-23a; 7b-12b)

Thus, the decisions below do not present this Court with

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[34] Cleveland Board of Educ. v. LaFleur, 414 U.S. 632 (1974) and Turner v. Dept. of Emp. Sec. of Utah, 423 U.S. 44 (1975).

[35] Plaintiffs argued that Title VII of the Civil Rights Act and its purposes were impeded because the State defendants based their denial of MESA benefits on employer practices, which were unlawful said Federal law. Plaintiffs also showed that the National Labor Relations Act was impeded because defendant MES Appeal Board granted MESA benefits to non-union members but denied benefits to union members covered by the same maternity leave clauses in contracts. (pp. 3a, 4a, 7a, 34a, 60a, 63a and 65a of Court of Appeals Appendix). Nash was cited for both propositions. Other authorities included Goodman v. Chrysler Corp. and MESC, and the Opinion of the Oklahoma Attorney General, No. 72-211 (Nov. 22, 1972), relying in part upon the Social Security Act, the Federal Program, and Title VII of the 1964 Civil Rights Act to hold Oklahoma's pregnancy exclusion unlawful. Addendum, 46b-48b)

an opportunity to review any alleged extension of *Nash* or expansion of the Supremacy clause.

Firestone also argues that "The Court below's extension of *Nash* . . . directly contravenes explicit holdings of this Court that a state law will not be set aside unless—[it really has to be]".[36] The Courts, in *UAW* v. *Taylor,* did not set aside any State law. (5a) Section 48, MESA, including the leave of absence part of that Section, remains intact. (28a) Moreover, the *State* itself had "set aside" its earlier *construction* of Section 48 prior to the final Order in *UAW* v. *Taylor.* (14b, 15b, 17b, 18b)

Firestone expresses belated concern that the lower Courts' alleged extension of *Nash* would interject Federal law farther into State matters than ever intended. It is Firestone, in its new suit, who asks the Federal Court to interfere with the State (17a; 53b) Firestone's request would cause Respondent MESC to set aside State laws and to spend much time and money crediting Firestone's accounts and then charging the accounts of other employers.

E. Changes In State Laws And Recent Federal Law Changes Make This Case Even Less Worthy Of This Court's Review.

In 1970, the Department of Labor advised States to eliminate special pregnancy disqualifications from their unemployment insurance laws. (32b, 33b). As a result of that letter and various Federal and State Court decisions and State Attorney General Opinions, the States began

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[36] Ironically, it is only Firestone who asks the Federal Court to set aside State laws. (Firestone's Complaint, paragraphs 2., 3., 4. and 5.; 17a)

eliminating such provisions which treated unemployed pregnant women different than others who could work.[37] *Turner* hastened these changes. The EEOC's post-*GE* v. *Gilbert* instructions emphasized that denying unemployment benefits, due to pregnancy, was still unlawful.[38]

In 1976, Congress reflected the case law by expressly providing that States may not deny unemployment insurance to pregnant women.[39]

Accordingly, this issue has lost the importance that it had in 1973, when *UAW* v. *Taylor* was begun.[40]

Moreover, almost all employers stopped forcing pregnant women out of work after April, 1972. The comparatively few women, who lose jobs or seniority due to pregnancy, may seek full back pay before the EEOC and in Court. Receipt of such pay would ultimately preclude receipt of State unemployment benefits.

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[37] Among the States which had directly or indirectly discriminated against pregnant women since 1971, at least 34 states have eliminated pregnancy exclusions in their statutes and six have replaced time limit exclusions w/ provisions disqualifying pregnant women while actually disabled. "The impact of the Equal Rights Principle on State Unemployment Compensation Laws, by Brown, Freedman, Katz and Price; Women and the Law Symposium on Sex Discrimination, unpublished materials (Mar. 1976), citing in part the December 1970 U.S. Dept. of Dabor Letter (32b), a chart by Margaret Dahm, published in U.S. Dept. of Labor Benefit Series Service, Un. Ins., Rept. 304, (Sept. 1975; Intl. Women's Year Special Supplement)

[38] These are partly reproduced in the Addendum. (27b-27b)

[39] The Federal Unemployment Tax Act, 42 U.S.C.A. Sec. 3304(a)(12), as amended by Pub. Law 94-566 (Addendum, 30b)

[40] The fact that Firestone's accounts will not be credited or that some women may sue for back unemployment benefits (where allowed by state statutes of limitations) does not make this case appropriate for certiorari. Compare Jordan v. Fusari, 496 F.2d 646, 648 (2d Cir. 1976), where the Court noted that it would be futile to remand that case for consideration by a three judge court since the statute in question had been repealed for over six months.

Accordingly, this case is only important to Firestone who seeks money at the expense of other Michigan employers and who tenaciously desires a moot ruling that the MESC may deny unemployment insurance to pregnancy women. Even if the substantive issues may be considered the Petition clearly presents no issues which are now of sufficient importance for this Court to review.

IV. FIRESTONE HAS NOT BEEN UNFAIRLY TREATED. ITS TREATMENT DOES NOT RAISE ANY CONSTITUTIONAL ISSUES, IMPORTANT OR OTHERWISE. OTHER GROUNDS FOR DENYING THE PETITION INCLUDE: 1) FIRESTONE'S LACHES AND 2) FIRESTONE'S NOT BEING ENTITLED TO ANY EQUITABLE RELIEF.

In its Argument III, Firestone cries unfairness in several respects and seeks to raise constitutional issues.

Contrary to Firestone's argument, the Court below correctly affirmed the District Judge's grant of Respondents motion for summary judgment. The Courts' holding, that Firestone's interests were adequately represented and that Firestone's suit was untimely, were based upon uncontroverted affidavits, the District Judge's own observations, and the Michigan Statute. (5a, 6a; 26b, 29b)[41]

Moreover, as a matter of law the Courts below properly held that Firestone's suit was untimely (6a) and that Firestone was wrong on the merits. (8a, 20a, and see Brief, *supra*, pp. 10-15) The Courts below did ignore the procedural requirements of Title VII of the Civil Rights Act. That was because *UAW* v. *Taylor* was not a Title

[41] Summary judgment for defendants was required because Firestone failed to controvert the affidavits. Rule 56(e), FRCP. Firestone did not raise this issue below; this may have been because all of Respondents uncontroverted affidavits were available to the Courts below.

VII suit for back pay or similar relief. (See discussion, *supra*, p. 20)

Contrary to Firestone's argument, this litigation shows no pattern of depriving Firestone of its rights. See the Counter Statement of the Case and Arguments I and II, *supra*.

Ware v. *Estes*, 328 F.Supp. 657 (N.D. Tex. 1971), *aff'd*, 458 F.2d 1360 (5th Cir.), *cert denied*, 409 U.S. 1027 (1972) does not conflict with the decisions beiow. In *Ware*, the Court merely held that a consent decree entered by a Court, in a *different jurisdiction* (D.Mass) was of little or no precedential value. (at 659) That is quite different than holding that a class action suit, in the same jurisdiction, of which the party in the new suit had ample notice and an opportunity to be heard, is a precedent.

Firestone argues that the District Court lacked jurisdiction to issue its final Order in *UAW* v. *Taylor* because there was no "case" or "controversy" within Article III, Section 2 of the Constitution. (Firestone's Question Presented No. 5 and Argument III). The Court of Appeals correctly rejected Firestone's view. (5a) While none of Firestone's arguments even approach respectability, this may be Firestone's least substantial "issue".

The undisputed facts establish that defendant State agencies were denying benefits to actual persons for the unlawful basis complained of in *UAW* v. *Taylor*, (21a, 25a, 28a; 18b; and Appendix below, (3a-7a, 86a, 87a, 171a-183a) Plaintiffs' counsel was unable to persuade defendants to follow Federal law and, thus, was forced to sue. (Appendix below, 86a-88a; 165a, 166a 171a-196a)

The District Court and defendants' counsel indicated that this case was hotly contested until this Court issued its decision in *LaFleur, supra*. (Appendix below, 310a) See

also the discussion as to the State financial interest in defending *Taylor* and as to adequate represenation by the State. (Appendix below, 86a-88a, 165a, 166a, 171a-196a)

Far from capitulating, certain defendants even failed to obey the Court Orders, in *Taylor, until* faced with possible contempt of Court during the December, 1975 argument. (23a, 25a; and Appendix below, 84a-86a, 94a)

Finally, the District Court did not hear just one side of the case. It considered and properly rejected Firestone's views on the merits in *UAW* v. *Taylor* (6a, 20a) and in Firestone's new suit. (8a; Appendix below, 357a)

As to adequacy of the State's representation, the Court of Appeals, relied upon the Appendix below, and said: "Indeed, the record reveals competent representation by the Commission." (6a)

The Court of Appeals correctly noted that:

> ". . . the fact that *UAW* v. *Taylor* was eventually terminated with a consent judgment does not indicate that there was no case or controversy between the parties. See *United States* v. *Board of School Commissioners*, 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973)." (5a)[42]

The case or controversy requirement is designed to insure that courts avoid issuing advisory opinions on abstract or hypothetical propositions of law and instead decide only definite and concrete questions touching legal relations of parties having adverse interests. The doctrine does not exist to assure that the parties in a true adversary proceeding handle the case in a manner satisfactory to every would-be intervenor.

The case or controversy requirements are met when

[42] See also Jordan v. Fusari, 496 F.2d 646, 648 (2d Cir. 1974), where the State had consented to a judgment after settlement of the case. In *Jordan*, the operation of part of Connecticut's unemployment insurance law was enjoinded.

there exists an actual legal dispute between the parties, as existed in *UAW* v. *Taylor*. Any question that might be raised about the adequacy of one or the other party's representation is irrelevant to the existence of a case or controversy.

In Firestone's new suit, it argued that the District Court also lacked the power to decide *UAW* v. *Taylor* because a three judge court was needed. The Court of Appeals and the District Court correctly rejected that argument (5a, 4b)

Though Firestone appears reluctant to abandon its three judge court argument,[43] since it does not formally argue it, Respondent UAW will not discuss that "issue" except as noted.[44]

[43] See pages 10 and 11 of Firestone's Statement of the Case and note 3.

[44] The three judge panel correctly ruled that "three judges are not required to decide the merits of this case" and then remanded the case to "consideration of the single judge to whom it was initially assigned for determination of whatever other Federal grounds may be presented by the complaint." (4b) Plainitffs withdrew any constitutional issues, prior to said ruling (5b). A three-judge court was not needed in July 1974, because the MESC, as of May 21, 1974, no longer denied benefits to women who were placed on maternity leaves, unless those women had actually requested such maternity leaves. (14b, 15b, 17b) This change was probably due to the settlement reached on April 30, 1974. ((11b, 19b) The District Court's Order of July 29, 1974 was a consent judgment entered due to a settlement in which the State defendants fully participated. (10b, 11b) Thus, the Federal Court did not disrupt any States procedures in any way which could possibly require a three judge court. In Jordan v. Fusari, 496 F.2d 646, 648 (2d Cir. 1974) the Court said that a three judge court was not needed because the State there had also consented to a judgment. The Court in UAW v. Taylor, did not invalidate § 48 of the MESA. (5a)

The District Court held the State's practice "unlawful as contrary to Federal law." (28a) The Court did not rely upon said 14th Amendment. If there is any doubt about the basis of the District Court's holding, then it should be resolved against Firestone, because Courts should avoid constitutional rulings where possible. Youakim v. Miller, 425 U.S. 231, 236 (1976).

This Court's Rule 24.1 mandates that Respondent briefly disclose other grounds why this Court should not review this case.[45] These grounds include Firestone's laches and other equitable considerations.

Laches may bar consideration of a suit where there is both lack of diligence on the part of a plaintiff and prejudice to a defendant.[46]

While the Courts below did not rule upon the laches defense to Firestone's suit, the District Court made findings, in *UAW* v. *Taylor,* which were analogous to a holding that laches barred Firestone's relief. The Court denied Firestone's motion to intervene as untimely because Firestone had informal and actual notice of *UAW* v. *Taylor* suit. (4a, 20a)

Firestone's knowledge of *UAW* v. *Taylor* and its lack of diligence is discussed, *supra.* (at pp. 4 and 8)

In District Court, Firestone argued that laches did not bar its suit to set aside *UAW* v. *Taylor* because its new suit was begun only about three months after the District Court denied its motion to intervene. Firestone, having been found to be untimely in *UAW* v. *Taylor,* did not cure that defect by filing its new suit. Firestone's delay of over two years in *UAW* v. *Taylor* was increased by three months when it filed its new suit.

Allowing Firestone its requested relief would prejudice the Defendants-Respondents in *Firestone* v. *Taylor. Firestone admits that granting it relief by crediting its MESA account will cause "these amounts to be made up by all*

[45] The UAW's Motion for Summary Judgment presented several reasons for dismissing Firestone's suit. The *res judicata* or collateral estoppel ground was discussed *supra,* pp. 16-18.

[46] See, for example American Home Products Corp. v. Lockwood Mfg. Co., 483 F.2d 1120, 1122 (6th Cir. 1973), *cert. den.,* 414 U.S. 1158, where the Court held an action for the infringement of a patent barred by laches.

employers in Michigan." (53b)[47] Those employers, who would thus be prejudiced by Firestone's intervention, include Respondents UAW and the MESC and the Appeal Board.

Thousands of women have applied for and received benefits because of the 1974 final Order in *UAW* v .*Taylor.* Firestone's new suit jeopardizes their benefits.[48]

Firestone had notice of that suit in August of 1973. It knew that its accounts were being charged, because of benefits paid to its employees, due to *Taylor,* after August 30, 1974. (16b-20b, 50b; Appendix below, 18b, 90a, 91a, 167a, 168a, 370a, 383a) In March, 1975, Firestone's counsel was told by an MESC Referee that Firestone should *then* seek relief in Federal Court. (b; Appendix below, 219a-223a) It is clear that Firestone sat on its hands while the State made said payments.

Firestone's relief would also harm defendant MESC by requiring it to reopen numerous files in order to credit Firestone's MESA account.[49]

Finally, Firestone wants to reopen *UAW* v. *Taylor,* begin discovery and litigate its erroneous legal theory that it is all right to force women out due to pregnancy and them then deny them unemployment insurance. Allowing that to deny them unemployment insurance. Allowing that *UAW* v. *Taylor,* their counsel and the courts by subject-

[47] Firestone is not entitled to this unsual relief. If such relief were granted Firestone, GM and every other employer in Michigan could then bring suit to have their accounts credited due to charges caused by this suit or by Firestone's intervention.

[48] Through Firestone claimed, in the Court below, that it is not asking the women to repay benefits, in fact Firestone is before the State agencies trying to recover benefits paid its empolyees. (5$b, 51b)

[49] This disruption of the State's system would be similar to that relied upon to deny intervention in NAACP v. New York, *supra,* 413 U.S. at 369.

ing everyone to such tiresome, wasteful and ludicrous proceedings.

In *Taylor* and in its new action, Firestone seeks equitable relief—that is, the crediting of its MESA accounts. Moreover, equitable considerations are involved in the issue of whether the District Court abused its discretion in not bending Rule 24, FRCP in favor of Firestone.

Under principles of equity, Firestone is entitled to no such relief. It would be inequitable for Firestone's accounts to be credited at the expense of all other Michigan employers (as Firestone requests) or at the expense of Firestone's women employees.

Firestone unlawfully forced women out of work due to pregnancy. (Firestone Brief, p. 6; 12a) Firestone did not pay full back pay to these women and, thus, has already profited from its wrongdoing while its women employees suffered financially from Firestone's unlawfulness.

Even considering the small amount of money involved in unemployment insurance benefits (compared to lost back pay), Firestone has not been hurt financially to any great extent. Because of its unlawful actions and those of the defendant agencies, Firestone's MESA account was not charged with unemployment insurance from July 1, 1965 to September, 1974. Thus, for over nine years, Firestone had the use of such money, interest free. (24b, 25b)[50]

Moreover, if a court were to grant plaintiffs' request to have its account credited by the MESC, it would cause the MESC to spend considerable time and money undoing what it previously did and this time to benefit a wrongdoer.

Firestone has dirty hands and is not entitled to ask this Court or the Courts below for any such equitable relief.

[50] Plaintiffs did not seek interest on the amounts wrongfully withheld from members of the class, which would have been a proper measure of relief.

CONCLUSION

For the foregoing reasons, this Court should *deny* the Petition.

Respectfully submitted,
John A. Fillion
General Counsel, UAW
Jordan Rossen
M. Jay Whitman
Associate General Counsel, UAW
By: /s/ Jordan Rossen[51]
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Dated: March 7, 1978.

[51] Research for parts of this Brief was done by Mary Flanagan, a law student working in the UAW Legal Department and supervised by UAW counsel.

INDEX OF APPENDIX OF RESPONDENT UAW

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3. MESC Manual, Part 6335 (March 20, 1972)*....12b, 13b
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6. UAW's Motion for Summary Judgment in *Firesone* v. *Taylor* and Attached Affidavits.....20b-26b

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*This part of the MESC Manual (12b-14b) was attached to and incorporated in plaintiffs' Complaint in UAW v. Taylor.

**The MESC Manual of May 21, 1974 (14b, 15b) is not a part of the record below. However, it is described in the MESC Instructions (17b) and is herein included for the Court's and counsel's convenience.

***These MESC Instructions of August 30, 1974 (16b-20b) were referred to in the District Court's Orders of July 28 and December 12, 1975 in UAW v. Taylor. They were submitted to said Court in the summer of 1974 and again prior to said 1975 Orders. Employers were notified of said Instructions and they were widely publicized. Certain pages of the Instructions are here omitted.

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UAW v. TAYLOR ORDER AS TO THREE JUDGE COURT UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

(September 20, 1973)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTRAL IMPLEMENT WORKERS OF AMERICA, UAW, PATRICIA SCHENCK, et al., on behalf of themselves and on behalf of all women employees of Michigan,
Plaintiffs

- vs -

S. MARTIN TAYLOR, Director of the Michigan Employment Security Commission (MESC), et al.,
Defendants.

Civil Action No. 4-70066

ORDER

A three-judge court having been duly convened to consider this action.

And the court, *sua sponte*, having questioned whether the claim that the state statute involved is unconstitutional presents a substantial issue, and having requested the parties to file briefs on this question,

And counsel for plaintiffs having withdrawn the request for a three-judge court as evidenced by his letter attached hereto,

And the court concluding that three judges are not required to decide the merits of the case,

UAW v. TAYLOR ORDER AS TO THREE JUDGE COURT

Upon consideration, it is ORDERED that the three-judge court be, and it hereby is, dissolved, and the cause is remanded for the consideration of the single judge to whom it was initially assigned for determination of whatever other federal grounds may be presented by the complaint.

/s/ WADE H. McCREE, JR.
The Honorable Wade H. McCree Jr.
United States Circuit Judge
/s/ DAMON J. KEITH
The Honorable Damon J. Keith
United States District Judge
/s/ CORNELIA G. KENNEDY
The Honorable Cornelia G. Kennedy
United States District Judge

Dated at Detroit, Michigan, September 20th, A.D. 1973

LETTER ATTACHED TO SEPT. 20, 1973 COURT ORDER

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW

Solidarity House
8000 East Jefferson Ave.
Detroit, Michigan 48214
Phone (313) 926-5216

September 17, 1973

Hon. Wade H. McCree, Jr.
707 Federal Building
Detroit, Michigan 48226

Re: UAW, et al v. Taylor, et al
Civ. Act. No. 4-70066

Dear Judge McCree:

We requested a three-judge court in the Complaint in the above case because we believed (and still believe) a three-judge court to be appropriate. At the conference, on September 13, we were given until September 20 to file another Brief on that issue. I wrote that Brief last week-end. We believe that it is a close question. However, for various reasons, we are not going to file the Brief.

Instead, we hereby withdraw our request for a three-judge court and ask that our Complaint be considered before a single judge. We do this because time is extremely important. Presently, women throughout Michigan are losing benefits because of the State's action and they are spending money and time litigating the maternity leave issues. In addition to our desire to save time, we ultimately expect to prevail on other Federal grounds; thus, the Court need not reach the equal protection issues. We believe that

our withdrawing our request for a three-judge court at this time will avoid litigating unnecessary issues in the case before this Court and, perhaps, on appeal.

Your law clerk, Ms. Donna Murasky, indicated that the Court could enter an appropriate Order based on this letter. If it is desired, we can also amend our Complaint. We would hope that any such Order would be entered as soon as possible so that this case can proceed on the substantive issues before a single judge.

We hereby request oral argument in regard to defendants' motion to dismiss and our motion for summary judgment.

Thank you and Judges Keith and Kennedy and your Law Clerks for your consideration, patience and time.

Respectfully,

/s/ JORDAN ROSSEN

cc: Hon. Cornelia G. Kennedy
Hon. Damon J. Keith
Edward J. Setlock, Assistant Attorney General
Sally Staebler, Michigan Legal Services Assistance
EEOC, Washington, Attn: Debra A. Millenson
EEOC, Detroit, Attn: Dorothy Smith, General Counsel
Womens Law Fund, Attn: Jane Picker and
Rita Page Reuss
John A. Fillion

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(April 30, 1974)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AREOSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al,

Plaintiffs,

v.

S. MARTIN TAYLOR, Director, and the MICHIGAN EMPLOYMENT SECURITY COMMISSION, et al,

Defendants.

Civil Action
No. 4-70066

ORDER RELATING TO CLASS ACTION
AND ORDER TO SHOW CAUSE

At a session of said Court held in the Federal Building, in the City of Detroit, State of Michigan, this 30th day of April, 1974.

PRESENT: HONORABLE CHARLES JOINER
U.S. DISTRICT JUDGE

Upon plaintiffs' Complaint, attachments to said Complaint, and Motion for Partial Summary Judgment, upon submission of this Order and Judgment by plaintiffs,

and after extensive conferences in Chambers and the Court being fully advised in the premises:

NOW THEREFORE, it is hereby ordered and adjudged as follows:

I. Plaintiffs' action is maintainable as a proper class action under Rule 23 of the Federal Rules of Civil Procedure. The members of the class, which are more specifically described in Paragraphs 4 through 8 of the Complaint, are, in general, all women who are, or will be employees under the Michigan Employment Security Act (MESA) or who were so-employed in Michigan from and after July 1, 1965.

II. Plaintiffs, defendants, *amici curiae* and said members of the class are hereby ordered to show cause before the Honorable Charles Joiner, Judge of this Court, in Room 251 Federal Building Detroit, Michigan, on July 29, at 11:00 a.m. why the proposed Order and Judgment attached hereto as Appendix A, should not be entered by this Court.

III. Pursuant to Rule 23, FRCP, said members of the class are further notified that:

A. The Court will exclude you from the class if you so request in writing by July 15, 1974;

B. The judgment will include all members of the class who do not request exclusion; and

C. Any member of the class, who does not request exclusion, may, if she so desires, enter an appearance in this matter by and through her own counsel.

IV. It is further ordered as follows:

A. Plaintiffs shall, within 14 days, send a copy of this Order and attachments to all *amici curiae* or proposed *amici curiae;*

B. Defendants shall, by July 1, 1974, pursuant to Rule 23(c)(2), FRCP, send a copy of this Order and attachments to every woman employee who, according to the records of defendants and their agents, has been denied MESA benefits from and after May 1, 1971, allegedly due to their not being "unemployed" within Section 48, MESA, due to maternity leave clauses in contracts or to employer maternity leave policies. Such notification shall be by regular mail to said class members' last know home addresses according to defendants' records;

C. Defendants and their agents shall, by June 30, 1974, cause the notice, attached hereto as Appendix B, to be published in at least the following newspapers: (1) Detroit Free Press (Metropolitan Detroit and out-State editions); (2) Detroit News (Metropolitan Detroit and out-State editions); (3) Flint Journal; (4) Grand Rapids Press; (5) Lansing State Journal; and (6) Marquette Mining Journal. The heading of said notice shall be printed in no smaller than 14 point type and the body of the notice is no smaller than 8½ point type. Said notice shall also be printed in poster-type lettering on a poster no smaller than 8½ x 13 inches in size which shall be affixed to all bulletin boards and other places in the offices of defendant Employment Security Commission and including its branch offices, and other offices or places of business where notices to employees-claimants regarding unemployment insurance matters are customarily posted.

/s/ CHARLES JOINER
Honorable Charles Joiner
U.S. District Judge

Approved:
JOHN A. FILLION
JORDAN ROSSEN
By: /s/ JORDAN ROSSEN
Attorneys for Plaintiffs
8000 East Jefferson Avenue
Detroit, Michigan 48214
Tel: (313) 926-5216
and
FRANK J. KELLEY
Attorney General
Law Building—Seventh Floor
Lansing, Michigan 48901
By: /s/ E. J. SETLOCK
Assistant Attorney General
7310 Woodward Avenue
Detroit, Michigan 48202
Tel: (313) TR 2-4900

APPENDIX A

(Title of Court and Cause)
PROPOSED ORDER AND JUDGMENT

• • •

[Omitted]

APPENDIX B

ATTENTION: Women Employees and Former Employees Who Have, Since June 30, 1965, Been Denied Benefits Under The Michigan Employment Security Act Solely Due to Mandatory Maternity Leave Policies Or Clauses in Contracts.

In July, 1973, a lawsuit was brought on behalf of you and other women employees by the United Automobile Workers

and by certain women employees against the Michigan Employment Security Com mission and others. The suit is *UAW, et al* v. *Taylor, et al,* U.S. Dist. Ct. No. 4-70066. This type of lawsuit is a "class action" and you and other women employees are "members of the class". The suit protests and seeks to stop the practice of denying unemployment insurance benefits under the Michigan Employment Security Act (MESA) to pregnant women, solely because they were forced out of work due to mandatory maternity leave clauses in contracts or unilateral employer maternity leave policies.

That lawsuit is now being resolved. Unemployment insurance claims, filed from and after April 5, 1972, will be reopened if they had been denied solely due to such *involuntary* maternity leave contracts or policies.

This represents a compromise by plaintiffs who sued to have all such claims reopened back to July 1, 1965. The Court Order will not specifically affect and will not prejudice the possible rights of women employees, who were denied benefits due to so-called forced maternity "leaves" from July 1, 1965 through April 4, 1972, to themselves seek to reopen their said claims. But plaintiff UAW and its lawyers have agreed that they will not pursue such claims.

A Court Order formalizing the above settlement will soon be presented to the Court. You are hereby ordered to show cause before the Honorable Charles Joiner, Judge of the U.S. District Court, in his Courtroom, 251 Federal Building, Detroit, Michigan, on July 28, 1974, at 11:00 a.m. why the afore-described Stipulated Order and Judgment should not be entered by said Court.

Pursuant to Rule 23, FRCP, you are further notified that:

MESC MANUAL OF MARCH 20, 1972

A. The Court will exclude you from the class if you so request in writing by July 15, 1974;

B. The Order and Judgment will include you and other women employee members of the class who do not request exclusion; and

C. You or any other member of the class, who does not request exclusion, may, if she so desires, enter an appearance in said lawsuit by and through her own attorney.

S. MARTIN TAYLOR,
Director of the Michigan
Employment Security Commission
by Frank J. Kelley, Attorney
General

MESC MANUAL

Part V	Unemployment Compensation	6335
	(Branch Office)	3-20-72
	Contested Claims	

CONTESTS INVOLVING PREGNANCY

6335

General. Subsection 28(1)(c) of the Act provides in part:

> "* * * a pregnant woman shall be ineligible to receive benefits for any week within the period beginning with the tenth calendar week before expected confinement, as determined by a physician, and extending through the sixth calendar week following the termination of pregnancy."

The Michigan Attorney General, in an opinion dated February 18, 1972, held the above cited clause to be invalid.

As a result of holding that the pregnancy ineligibility provision with respect to the statutory 10 and 6 week periods are unconstitutional, the Commission practice with respect to issuance of (re) determinations on or after March 5, 1972 will no longer automatically apply a finding of ineligibility for such periods.

* * *

In accordance with the provisions of Subsection 48 of the MES Act, an individual shall not be deemed to be unemployed during any leave of absence from work granted by an employer either at the request of the individual or pursuant to an agreement with his duly authorized bargaining agent.

* * *

In applying the applicable provisions of Subsection 48 of the MES Act it must first be determined whether or not the contract provides for a mandatory pregnancy leave of absence. If the leave of absence is mandatory, the individual will be deemed not to be unemployed during such leave.

* * *

In the disposition of cases involving a leave of absence from employment, due to pregnancy, it will be necessary for the Branch Office to specifically request the employer involved, to furnish verbatim, the language pertaining to the granting and/or request for a leave of absence as contained in the contract. * * *

MESC MANUAL

(May 21, 1974)

Part V Unemployment Compensation (Branch Office) Contested Claims 6335 5-21-74

CONTESTS INVOLVING PREGNANCY

6335

General.

Pregnancy is not an identifiable issue. Whenever an issue arises as to a claimant's eligibility during any particular stage of pregnancy, the issues (other than separation issues) will be identifiable as ability and/or availability.

* * *

In accordance with the provisions of Section 48 of the MES Act, an individual shall not be deemed to be unemployed during any leave of absence from work granted by an employer at the request of the individual.

If an individual requests and obtains a leave of absence in accordance with the provisions of Section 48 of the MES Act, she is deemed not to be unemployed during such leave. A specific request for a leave of absence must be made by the individual before she would be deemed as not being unemployed. At the expiration of the leave she may qualify for benefits if otherwise eligible and qualified.

A unilateral leave of absence cannot be imposed by the employer without a specific request being made by the individual involved. If no such request is made, even though the employer placed the individual in "leave status" Section 48 of the MES Act should not be applied so as to conclude that the individual is not an unemployed individual.

If a contract provides that an individual shall become eligible for a maternity leave by submitting medical evidence verifying pregnancy, the mere submission of such evidence is not to be considered as a written request for a leave of absence. Therefore, unless a specific request for a leave of absence is made by the individual, the individual should be considered as unemployed under the provisions of Section 48 of the MES Act.

In the disposition of cases involving a leave of absence from employment, due to pregnancy, it will be necessary for the Branch Office to specifically request the employer involved, to furnish verbatim, the language pertaining to the request for a leave of absence. Such response may be in the form of a reply on Form MESC 1707 or the furnishing of a copy of the request to the Branch Office.

If the individual quit her job voluntarily without good cause attributable to the employer as contrasted to quitting because of a pregnancy illness which prevented her continuing work, the disqualification provisions apply. * * *

MESC INSTRUCTIONS AND NOTICE TO EMPLOYERS

(August 30, 1974)

Department of Labor
MICHIGAN EMPLOYMENT
SECURITY COMMISSION
7310 Woodward Avenue
Detroit, Michigan 48202

August 30, 1974

TO: STATE OFFICE ADMINISTRATIVE STAFF, DISTRICT SUPERVISORS, AND BRANCH OFFICE MANAGERS

FROM: S. MARTIN TAYLOR, DIRECTOR

SUBJECT: IMPLEMENTATION OF FEDERAL COURT ORDER CONCERNING MANDATORY LEAVES OF ABSENCE DUE TO PREGNANCY

This release supersedes the instructions as contained in the release dated August 21, 1974 on the above mentioned subject. The earlier release should be destroyed.

On July 29, 1974 the U. S. District Court issued an order in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, et al,* v. *Martin Taylor, Director, and the Michigan Employment Security Commission, et al,* requiring the Commission to "reopen, rehear and reconsider, . . . the claims of all employees-claimants denied MESA (unemployment benefits) from and after April 5, 1972, solely due to . . . mandatory maternity leave contract clauses and to such "leaves of absence" unilaterally imposed due to employer policies . . .". Furthermore, the Court Order also indicated that

such Order does not prejudice the rights or alleged rights of an employee-claimant, who did not receive MESA (unemployment) benefits between June 30, 1965 and April 5, 1972, to on her own *individually* request the MESC for benefits which had been denied because of said maternity leave policies.

To comply with the Court Order to "reopen, rehear and reconsider . . .", it will be necessary for the Commission to identify the claims of those individuals who were denied benefits solely because they were required to take mandatory leaves of absence due to pregnancy at any time within the period from April 5, 1972 through May 31, 1974. No attempt will be made to identify such individuals who did not receive benefits between June 30, 1965 and April 5, 1972. However, in all instances where an individual appears at a branch office and expresses a desire to file a claim for such period, the Commission will consider and/or reconsider the claim of all such individuals who did not receive unemployment benefits during such period because they were placed by their employer on a mandatory leave of absence due to pregnancy.

• • •

On May 21, 1974 revised procedure was released, providing that only a claimant who is on a maternity leave *pursuant to her request* would be considered as not "unemployed" under Section 48 (not in the labor market). In the absence of assurance that such procedure was implemented on or before May 31, 1974 the Cour Order should be considered to be effective for calendar week ending July 3, 1965 through calendar weeks ending June 1, 1974.

• • •

Any claim filed for a compensable period prior to calen-

dar week ending July 3, 1965 must be denied without further processing. The determination should state:

• • •

The 10 and 6 week pregnancy ineligibility provision which held a woman ineligible under Section 28(1)(c) for 10 weeks prior to the expected date of confinement and six weeks following termination of the pregnancy, and which was repealed by Act 104 of the Public Acts of 1974, will not be applied with respect to any retroactive mandatory maternity leave of absence, whether or not previously imposed.

VOLUNTARY REQUESTS FOR LEAVE OF ABSENCE

The U. S. District Court Order issued on July 29, 1974 does not cover a leave of absence granted by an employer pursuant to an individual's request and such individuals are therefore ineligible under Section 48 of the Act. If it is ascertained that the claimant voluntarily requested a leave.

Department of Labor

MICHIGAN EMPLOYMENT SECURITY COMMISSION NOTICE TO EMPLOYERS REGARDING ELIGIBILITY FOR UNEMPLOYMENT BENEFITS IN CLAIMS OF MANDATORY MATERNITY LEAVES OF ABSENCE

Prior to May 20, 1974, the Michigan Employment Security Commission had been holding that a woman on a mandatory maternity leave of absence was deemed not to be "unemployed" under Section 48 of the Michigan Employment Security Act (MESA), and therefore not eligible for unemployment benefits if the leave of absence was ". . . . granted by an employer either at the request of the

individual or pursuant to an agreement with his duly authorized bargaining agent . . . .". This procedure was changed because of proceedings pending before a U. S. District Court.

Thereafter, on July 29, 1974, the U. S. District Court, Eastern District of Michigan, Southern Division issued an order in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, et al,* v. *S. Martin Taylor, Director, and the Michigan Employment Security Commission, et al,* holding that the practice of denying benefits under Section 48 of the MESA to women employees, who are forced out of work due to a mandatory maternity leave of absence, is unlawful as contrary to Federal law. The order further requires the Commission to consider and/or reconsider the claims of all women who were on a mandatory maternity leave on or after April 5, 1972 and held that the order does not prejudice the rights of any claimant who did not receive unemployment benefits between June 30, 1965 and April 5, 1972 to individually request such benefits.

As a result of this order the Commission will consider and/or reconsider the claims of all women who did not receive unemployment benefits on or after June 30, 1965, due solely to the reason that they were placed on a mandatory maternity leave of absence by their employer.

You are being asked to provide the Commission with wage and/or separation information concerning a claimant's employment for calendar year 1964 or thereafter. Based upon the information you and the claimant provide, benefits may be paid if the claimant is held to have been eligible for unemployment benefits in all other respects during the week(s) she had been placed on a mandatory maternity leave of absence.

If benefits are paid and charged to your account you will receive copies of checks, which although recently issued, are for weeks ending July 3, 1965 or after. Such check copies will be coded, in the amount block at the top, with the letter "M" and the year to which the payment applies. Charges to your account will be as of the quarter in which the payment is made. Thus, if a payment is made in September, 1974 for a week in 1968, the charge to your account will be made with respect to the quarter ending in September, 1974.

April 28, 1976

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN

THE FIRESTONE TIRE & RUBBER COMPANY,

Plaintiff,

v.

S. MARTIN TAYLOR, DIRECTOR, * * * and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendant.
Civil Action File
No. 670651

MOTION FOR COSTS AND EXPENSES; AND MOTION FOR SUMMARY JUDGMENT BY DEFENDANT UAW*

NOW COMES Defendant, International Union, United Automobile, Aerospace & Agricultural Implement Workers

*This represents portions of the motion reproduced by Firestone in Appendix below at pp. 404a-412a.

of America-UAW by its counsel, and hereby moves for summary judgment of dismissal and for costs and attorneys fees in the above action; in support thereof, said Defendant says as follows:

This Motion is based upon the files and records in the above case and in *UAW, et al.,* v. *Taylor, et al.,* Civil Action No. 4-70066.[1] * * *

Plaintiff has failed 'o state a claim upon which relief can be granted for at least the following reasons:

I. *Plaintiff is Barred From Collaterally Attacking This Court's Orders in UAW* v. *Taylor.*

1. It is obvious from Plaintiff's Complaint, Prayer for Relief and Interrogatories directed toward Defendant UAW, that Plaintiff is attempting, in this "new" action, to set aside portions of what was decided in *UAW* v. *Taylor.* More specifically, Plaintiff seeks a declatory judgment, directly opposite to the declatory judgment in *Taylor,* Plaintiff bases its requests for relief upon legal arguments which were decided and rejected in *Taylor,* and Plaintiff asks that its account be credited, because it was charged due to *UAW* v. *Taylor.*

2. Plaintiff was aware of *UAW* v. *Taylor* from and after August, 1973 and it was aware that its account was being charged by the MESC, pursuant to the July, 1974 Order in *Taylor* and the August 30, 1974 MESC Instructions, from and after September 1974. Plaintiff, as this Court ruled in December 1975, had notice of the *Taylor* suit,

[1] The "old" suit will usually be referred to as *"Taylor"*. The instant suit may be called *"Firestone"*.

but chose not to intervene in a timely manner in *UAW* v. *Taylor*.[2]

3. Plaintiff cannot accomplish indirectly, what it unsuccessfully sought to do in *UAW* v. *Taylor*.

4. Plaintiff filed an Appeal to the Court of Appeals for the Sixth Circuit in *UAW* v. *Taylor* and that Appeal is pending.

5. If Plaintiff has any right to relief, which it does not, the Court of Appeals for the Sixth Circuit will now decide those questions.

II. *Plaintiff's Suit is Barred by Res Judicata, Because of An Adverse Order by the Ingham County, Michigan, Circuit Court of August 30, 1974.*

1. The Ingham County Circuit, in *Sadro, et al.* v. *Hamill Mfg. Div. of Firestone and MESC,* Civil Action No. 15738-C, on August 30, 1974, reversed the Appeals Board's denial of benefits to Plaintiff Firestone's employees, who had been forced out of work due to pregnancy. (See Exhibit 11 to said Affidavit of Jordan Rossen). That State Court Order was expressly based upon this Court's July 29, 1974 Order in *Taylor*. The State Court, thus, held that this Court had jurisdiction in *Taylor,* that this Court acted properly in *Taylor* and that State Courts were bound by *Taylor*. Plaintiff here is bound by all of said holdings.

2. Firestone was properly served in *Sadro*. (Exhibits 7, 8, 8A, 9 and 10 to Rossen Affidavit). Plaintiff Firestone did not appeal said Ingham Circuit Court Order.

---

[2]See also Exhibits 13, 14, 15 and 16 to Rossen Affidavit in *Taylor* which Affidavit is hereto attached and herein incorporated. Hereto attached herein incorporated are also the following documents filed in *UAW* v. *Taylor:* 1) Plaintiffs Opposition to Motion to Intervene and other Motions by Firestone Tire and Rubber, Hamill Mfg. Co., Div. of Firestone, Firestone's Steel Products Co., Div. of Firestone; 2) Affidavit of Gerald Koskie; 3) Affidavit of Anne McLeod Trebilcock; and 4) Affidavit of Angelo Bommarito.

3. Plaintiff is now barred, by *res judicata* or collateral estoppel, from re-litigating what was decided by the Ingham Circuit Court, as afore described in Paragraph II.1. See, for example, *Cacavas* v. *GM and UAW,* 444 F.2d 506, 507 (6th Cir. 1971), affirming dismissal by the late Chief Judge Theodore Levin of this Court.

III. *Plaintiff is Barred by Laches from Seeking its Requested Relief.*

Notices of this Court's proposed ruling that it was unlawful to deprive women of unemployment insurance benefits, after they had been forced on maternity leaves of absence, was posted throughout Michigan after April 1974. Plaintiff was advised of the action in *Taylor* in August 1973. By choosing not to come in in a timely manner, Plaintiff is estopped and barred by Laches from now seeking to set aside what this Court did in *UAW* v. *Taylor*. As stated above, this Court held that Plaintiff had notice of the *Taylor* suit.

IV. *Plaintiff's Suit Does Not Meet the Requirements of Rule 60, FRCP.*

1. Plaintiff's new suit seeks relief from the *Taylor* judgment. Though Plaintiff does not cite Rule 60, that Rule governs Plaintiff's requested relief.

2. Under Rule 60(b), a party may seek relief from judgment in the original proceeding or by bringing an independent action.

3. Plaintiff Firestone cannot now get relief from the *Taylor* judgment, under Rule 60, because it can meet none of the requirements of that Rule. This Court so held in its December 1975 Order. Plaintiff cannot show "mistake, inadvertence, surprise or excusible neglect" because it *deliberately* chose not to timely intervene in *Taylor*.

V. *Plaintiff is Wrong On the Merits.*

1. Plaintiff bases its request for relief on its view that this Court's decisions and Orders in *UAW* v. *Taylor* were wrong as a matter of law and that *Geduldig* v. *Aiello* procluded relief for women in *UAW* v. *Taylor.*

2. Moreover, Plaintiff's argument is wrong as a matter of law. *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), affirming 465 F.2d 1184 (6th Cir. 1973); *Turner* v. *Department of Employment Security of Utah,* U.S. , 46L.E.2d 181 (November 17, 1975); and *UAW* v. *Taylor,* Orders of July, 1974, July, 1975 and December, 1975.

VI. *There is No Jurisdiction of the Subject Matter.*

1. All of the substantial Federal issues in this case have been decided in *Taylor.*

2. There is no Federal question left which might give this Court jurisdiction over the subject matter of Plaintiff's new suit.

VII. *Plaintiff is Not Entitled to Any Equitable Relief.*

1. Plaintiff unlawfully forced women out of work due to pregnancy.

2. Plaintiff has not paid full back pay to these women and, thus, has already profited from its wrongdoing while the women in question have suffered financially from Plaintiff's wrong doing.

3. Even considering the small amount of money involved in unemployment insurance benefits (compared to lost back pay) Plaintiff has not been hurt financilly to any great extent. Plaintiff's account was not charged with unemployment insurance from July 1, 1965 to September 1974, because of its unlawful actions and those of the Defendants in *UAW* v. *Taylor.* Thus, for over nine years,

Plaintiff had the use of such money, interest free. At the prevailing rate for borrowing money during those nine years, Plaintiff has already obtained nearly the equivalent of any unemployment insurance which might have been charged to its account, after September 1974. Plaintiffs in *UAW* v. *Taylor* did not seek interest on the amounts wrongfully withheld from members of the class, which would have been a proper measure of relief. Thus, Plaintiff Firestone, has done quite well as a result of its unlawful conduct and the unlawful actions of the Defendants in *UAW* v. *Taylor.*

4. Plaintiff Firestone is asking this Court to exercise its powers in equity by ordering the MESC not charge its account with MESA benefits. Plaintiff has dirty hands and is not entitled to ask this Court for an equitable relief.

5. If this Court were to grant Plaintiff's request to have its accounts credited by the MESC, it would cause the MESC to spend considerable time and money undoing what it previously did and this time to benefit a wrongdoer.

VIII. *The UAW is Not a Proper Party Defendant in This Case.*

• • •

IX. *Defendant UAW is Entitled to an Order For Costs and Expenses Including Time Expended by its Legal Department in Defending This Action and Preparing the Above Motion.*

• • •

WHEREFORE, for the above reasons and those stated in our Brief and based upon *UAW* v. *Taylor* and the Briefs and Affidavits filed in *Taylor,* Defendant International

Union, UAW respectfully prays that this Court grant the following relief:

• • •

Respectfully submitted,
John A. Fillion, General Counsel
Jordan Rossen, Associate General Counsel
By: /s/ JORDAN ROSSEN
Attorneys for Defendant International Union, UAW
8000 East Jefferson Avenue
Detroit, Michigan 48214
(313) 926-5216

• • •

Dated: April 27, 1976

• • •

Page 412 of Firestone's Appendix Below:

NOTE: The Exhibits to the foregoing "Motion for Costs and Expenses; and Motion for Summary Judgment by Defendant UAW" (each initially made in *UAW* v. *Taylor*) are contained in the Joint Appendix as follows:

J.A. Pages

1. Supplemental Affidavit of Jordan Rossen of December 1975, together with attachments.....164-216
2. Plaintiffs' Opposition to Motion to Intervene and Other Motions of Firestone 247-251
3. Affidavit of Angelo Bommarito of December 1975, together with attachments 217-230
4. Affidavit of Gerald Koskie, together with attachments 231-244
5. Affidavit of Anne McLeod Trebilock 245-246

ADDENDUM

EEOC'S POST *GE* v. *GILBERT* PROCEDURES

Number 915
December 30, 1976

1. SUBJECT. PROCEDURES FOR PROCESSING PREGNANCY RELATED ALLEGATIONS OF SEX DISCRIMINATION
2. PURPOSE. This notice establishes the procedure for processing charges of sex discrimination in light of *General Electric Co.* v. *Gilbert,* 45 U.S.L.W. 4031 (December 7, 1976).
3. ORIGINATOR. Office of Compliance Programs.
4. EFFECTIVE DATE. January 3, 1977

• • •

6. The Commission has determined that distinctive treatment of pregnancy or maternity in the following situations continues to be unlawful because these criteria have a disproportionate impact on women and are therefore gender based or are by their terms gender based:

• • •

   d. mandatory maternity leaves for predetermined time periods.
   e. dismissals of pregnant women
   f. denials of reemployment rights to women on leave for pregnancy-related reasons
   g. denials of unemployment benefits to pregnant women
   h. denials of seniority or longevity credit to women on leave for pregnancy-related reasons

• • •

7. District Directors will, therefore, continue to make determinations on charges involving the above criteria in

the circumstances permitted prior to the Supreme Court's decision,

* * *

Federal Rules of Civil Procedure:

Rule 24. Intervention.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 56. Summary Judgment.

* * *

(e) Form of Affidavits; Further Testimony; Defense Required. * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

* * *

Rule 60. Relief From Judgment or Order.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceedings for the following reasons: (1) mistake, inadvertence, suprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not

affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Federal Unemployment Tax Act

§ 3304. Approval of State laws

(a) Requirements.—The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that—

* * *

(12) no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy;*

Social Security Act:

42 U.S.C.A. PUBLIC HEALTH AND WELFARE Ch. 7

§ 503. State laws, provisions required; stopping payments on failure to comply with law

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for —

(1) Such methods of administration * * * as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and

* * *

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied;

Title 28, U.S. Code Annotated:

§ 1738. State and Territorial statutes and judicial proceeding; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexted, if a seal exists, together with a certification of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

*26 U.S.C.A. § 3304(a)(12), as amended by Pub. Law 94-566, § 312(a), October 20, 1976.

U.S. DEPARTMENT OF LABOR LETTER
U.S. DEPARTMENT OF LABOR
MANPOWER ADMINISTRATION
Washington, D.C. 20210

December 31, 1970

UNEMPLOYMENT INSURANCE PROGRAM
LETTER NO. 1097

TO: ALL STATE EMPLOYMENT SECURITY AGENCIES

SUBJECT: Provisions in State Unemployment Insurance Law Which Discriminate on the Basis of Sex

* * *

PURPOSE: To request State agencies to obtain early legislative action to remove State unemployment insurance law provisions which discriminate against persons on the basis of sex.

The enactment of P.L. 91-373 makes it necessary for the next session of State legislatures to amend extensively State unemployment insurance laws to implement the provisions of the new Federal law. This presents an opportunity to obtain significant improvements in State unemployment insurance laws which are unrelated to P.L. 91-373.

A much-needed improvement is the removal of the provisions which have crept into State unemployment insurance laws that discriminate against women. Aside from the obvious inequity of such provisions, they are becoming increasingly the subject of legislative scrutiny, of proposed legislative remedy, or of challenge in courts. The three references used above, and discussed below, illustrate a growing trend.

* * *

2. *Pregnancy and post-pregnancy provisions*

Provisions in State laws subjecting pregnant and post-pregnant women to more stringent eligibility conditions than are applied for disabilities common to both sexes seem patently discriminatory. Insofar as the period of actual pregnancy is concerned, a claimant would, at some point during the pregnancy, be considered unable to work and/or unavilable for work even if the State law had no special "pregnancy provision." That being the case, special pregnancy provisions are subject to challenge as discriminatory.

The special post-pregnancy provisions in State laws which provide for some arbitrary period of ineligibility without regard to the point in time at which the actual disability terminated, or which impose some additional requirement or obstacle to reinstatement to eligible status which is not imposed in the case of any other disability are clearly discriminatory.

* * *

/s/ PAUL J. FASSER, JR.
Deputy Assistant Secretary
for Manpower and
Manpower Administrator

OPINION IN *GOODMAN* v. *CHRYSLER CORP. AND MESC*

[¶ 9341] *Minnie Goodman* v. *Chrysler Corp. and the MESC*. Michigan Circuit Court, Wayne County. No. 208 538, 2/6/73.

Opinion on Motion for Summary Judgment and Remand

Bowles, J.: The issue posed is whether or not that provision of Section 28(1)(c) providing that a pregnant

woman shall be ineligible to receive benefits for any week within the period beginning with the 10th calendar week before expected confinement as determind by a physician and extending through the 6th calendar week following the termination of pregnancy is constitutional.

Can this exclusion face the scrutiny of the test of equal protection of the law? The test would be here whether the particular exclusion is rationally related to the purpose of the legislation which, in broad terms, is calculated to provide unemployment compensation to one who is able to work who, at the same time, cannot secure suitable work. This particular classification or exclusion on the face of it does not provide benefits to workers who are involuntarily unemployed; it does not encourage stable employment.

The Court can and will give respectful consideration to the pronouncements of responsible department experts. The United States Department of Labor Unemployment Insurance Program Letter No. 1097, dated December 31, 1970, observes:

> "Provisions in State laws subjecting pregnant and post-pregnant women to more stringent health conditions than are applied for disabilities common to both sexes seems patently discriminatory. Insofar as the period of actual pregnancy is concerned, a claimant would, at some point during the pregnancy, be considered unable to work and not available to work, even if the State laws had no special pregnancy provision. That being the case special pregnancy provisions are subject to challenge as discriminatory."

A similar view was expressed by Harold Rosemont, Director of the Unemployment Insurance Bureau of the MESC. The exclusion may be analogized to *LaFleur* v. *Cleveland*

Board of Education, 465 F. 2d Sec. 1184 wherein it was held that the School Board policy of requiring a female teacher to take maternity leave from five months before expected delivery until three months after birth of her child would be discriminatory. It is not reasonable—it flies in the face of medical fact—and is arbitrary to automatically exclude all pregnant females from benefits for a fixed period of time without regard to the physical ability to work of each particular employee. The particular pregnancy provision, then, is unconstitutional as denying equal protection of the law.

Of perhaps more general and fundamental concern, the particular pregnancy provision here not only fails to effectuate the sound policies of the Federal Unemployment Insurance Program but conversely impedes and frustrates that policy. The Michigan Act must be administered and construed in line with the declared policy and purposes of the Federal programs under the Social Security Act, Title 42 USCA 501 et seq. Fundamentally, it is a Federal program administered by individual States. The program involves grants to the States which meet the Federal standards. Hence, it is elementary that the State Act must conform to Federal legislative intentions and declared policies.

The Preamble to the Michigan Act and its Section 2 indicate both Federal and State policies to protect workers from the hazards of unemployment. The disputed exclusion denies potection to a type of worker, that is, one involuntarily out of work, for which the Federal program was designed and intended. The Federal program, then, cannot be frustrated or its laudable purposes defeated by State Acts or regulations. See *Nash* v. *Florida Industrial Commission,* 389 U. S. 235, 239, 240.

This is apart from the question that there is a felt need

for coverage of women. All available governmental and private statistics indicate, fundamentally, a greater need for the protection of women than for males. Less than 20 percent of women earned more than $6,999 in 1969 and a general earnings gap in salaries paid to male and female workers is not based upon differences in educational achievement or capability. In fact, the level of wages paid to women throughout the '60's was less favorable in relationship to the level of men's wages than it had been in the 1950's. This is not the kind of "progress" we can be proud of. Statistics also show that the unemployment rates are consistently higher for women than for men; for example, in 1969, the rate was 4.7 percent as opposed to 2.8 percent for men. We, as trial judges sitting in a court of general jurisdiction, are acutely aware of the many one-parent families where the mother, in attempting to keep the family together, is in the labor market and so the problem of the working mother is the problem of the minor children.

The necessary and brutal result, by classifying women as being incapable of work for the 10 weeks before the expected delivery and then for a nadditional six weeks following confinement, is that the Act denies to the excluded class benefits upon which they might well depend for the sheer necessities of life, not only for themselves but for the minor children.

We can find no rational basis in Unemployment Compensation law or social policy justifying discriminatory treatment. See *Reed* v. *Reed,* 404 U. S. 71.

It is then clear that the particular exclusion is in conflict with the fundamental purposes of the Federal Unemployment Insurance Program of which the Michigan Program is a part.

Without reference to the other legal considerations and arguments made, and for the reasons hereinbefore set forth, the Court holds the subject exclusion unconstitutional.

OPINION IN *MILEFF* v. *MESC AND KRAFTUBE FABRICATION*

[¶ 8764] *Willa June Mileff* v. *MESC, App. Bd., and Kraftude Fabrication.* Michigan Circuit Court, Wayne County. No. 304-515, 1/7/60.

[Opinion of the Court]

Baum, J.—The Court: Well, I'm going to do something that was started as a recent practice. You are going to get a nisi opinion, a provisional opinion. This is the way that I feel that the case ought to be decided and the provisional decision is subject to correction. You have a right to submit briefs if you want to, and if they persuade me that I have gone wrong, the decision will be changed.

I think that the Appeal Board ought to be reversed. I think that there was an error of law here.

First, I think that the Appeal Board has given Section 48 an interpretation never intended by the Legislature. In interpreting Statutes, I think that the Judicial body doing the interpreting should strive for interpretations which make the Statute internally consistent and harmonious, where this is reasonable.

Now, in view of the general purposes set forth early in the Statute, I believe in Section 2, one should avoid construing Section 48 in such a way as to penalize or disqualify people who are out of work due to no fault of their own and who are ready, willing and able to work. At least, there should

be an endeavor to construe Section 48 in this way, if such construction is reasonable. I think it is.

Section 48 says that there is no unemployment when a person is away from work on a leave of absence at his request, or pursuant to an agreement between the employer and the duly authorized bargaining agent of the employee.

Let us look at the first phase of this Statue. I stress the phrase, "at the request of the individual." Properly construed I think that this Statute has reference to a leave of absence during such time as the request of the individual for a leave persists.

In the case before me, the request for leave of absence ceased to persist some time in June, and under appropriate statutory construction unemployment commenced at this time.

Let me now direct my attention to the second portion of Section 48 which is concerned with leaves of absence which are pursuant to an agreement with the duly authorized bargaining agent. If we turn to the collective bargaining agreement which was in force in this case, I think that the following observations can be made and are well founded:

Article 11, Section 1 of the Collective Bargaining Agreement is designed, primarily, for the convenience of the employee. It is designed to give the employee a leave with the assurance that he will be able to return to work, in those cases where the employee has good cause for such leave. In Section 1 of the collective agreement I stress this phrase:

> "—without the loss of seniority to an employee *who wishes* to leave the service of the employer, temporarily, for a period not to exceed one year."

The "wish" of the employee would seem to be paramount and determinative. There is nothing in this section to suggest that the wish originally expressed by a worker is unalterable. This would mean to me that an employee could, without the loss of seniority, alter his original request for leave, so as to shorten the leave period. Thus a leave of absence under Section 48 which is in accordance with the collective bargaining agreement would be a leave of the length desired by the employee, not to exceed one year. In Mrs. Mileff's case there was a leave in accordance with the union contract until June when she asked to return to work and not thereafter.

In any event, it seems to me, that under Section 48 one ceases to fall within the disqualification; or, to put it another was, an employee is deemed to be unemployed for compensation purposes at such time as the employee manifests a desire to return to work and is ready, willing and able to do so.

There is a third portion of Section 48 having to do with leaves of absence "in accordance with law". This portion says there is no unemployment during such a leave. "In accordance with law" is a very general and vague phrase. I'm not sure that I know what it means. But, I do not think it means that, by private contract, an employee can deprive himself of the right to compensation during a period of involuntary and faultless unemployment while he remains ready, willing and able to work.

To interpret the vague language, "in accordance with law," otherwise would do violence to Section 31 of the Statute (which renders unenforceable any contracts made by employees to forego compensation benefits). And, it seems to me, that an interpretation which would hold that Mrs. Mileff was not unemployed although out of work through no fault of her own and ready, willing and able to work would be in conflict, also, with the beneficent purposes

of the Statute set forth in Section 2. "In accordance with law" does not mean in discordance with Section 2 and 31 of the Employment Security Act. And, even if she had made a contract to stay away from work until September, if the contract had the effect of barring compensation, it would not, in my opinion, be in accordance with law as meant in Section 48.

I think that there is a temptation to error in a case of this kind, which arises from our general, well accepted, orthodox notions of contract law. Under the law of contracts we frequently allow individuals to make their own law as between one another; and, when an individual who is of age, mentally competent and not under duress, makes his own bed, the law generally requires that he lay in it, even though it is full of prickly thorns. That is the law of contracts, that is not the law of social security. Thus, even if Mrs. Mileff was barred by a contract between her and the employer from going back to work before September, and she could not successfully sue for wages for the period from June to September, this does not mean that she is not entitled to unemployment compensation.

Even in the law of contracts we sometimes protect groups or people who are too weak or inadequate or who lack the bargaining power to protect themselves. As a matter of public policy, we hold that certain kinds of contracts made by people in these categories are unenforceable.

We have done something of this nature with respect to contracts of parents for employment of their children. Under the common law, until emancipation of the child, the parent could direct his labor. We now have child labor laws which we do not permit adults to alter by contract. We have minimum wage laws which we do not permit employers and their employees to alter by contract between them. We have

maximum hours laws which we do not permit employers and their employees to set aside by their own contract. And, I suppose, many other examples could be found.

The Statute we are concerned with is a similar statute. It seeks to relieve the burdens of insecurity resulting from unemployment which is involuntary and without substantial fault or taint of character on the part of the employee. But, we need not go so far as to say that a contract for a leave of absence of fixed duration is in no wise enforceable.

It may be, as a matter of contract law, that one who enters into an agreement for a leave of absence for one year cannot, prior to the end of that year, force the employer to hire him. And, if he requests employment at the end of six months, it may well be that he will have no action for breach of contract against the employer who refuses to hire him. But, we are not talking about a contract suit now or a contract right, we are talking about the right to social security.

In my opinion, in such a Statute as the one we have, we should guard against giving effect to private agreements between employer and employee which may deprive decent employees without fault from receiving security which the Statute intended to confer upon them. Thus, even if there were an agreement between the employer and the claimant that she would take a leave until September, this would not be a measure, "in accordance with law", which would prevent her from being "unemployed" under the Statute from and after the day in June when she asked to go back to work, armed with medical proof of her employability.

Let me turn now to Section 29(d) which is the section specifically concerned with pregnancy leaves. I do this since it is possible that this section, rather than Section 48, governs. Section 29(d) is a particular and specific section

having to do with the very situation before this Court today.

Section 29(d) provides that an individual shall be disqualified for benefits for the duration of her unemployment when it is found by the Commission that total or partial unemployment is due to pregnancy. There follows a proviso as follows:

> "Provided that this provision shall not apply to an individual who has received a leave of absence due to pregnancy from her employment and applies for reinstatement at the termination of such leave but is not re-employed by such employer. Leave of absence, as used in this section shall mean an authorized absence from employment with an assurance of re-employment by the employing unit."

Now, the first question I have about Section 29 is whether or not the proviso is even applicable. Section 29 says that an individual is disqualified for the duration of unemployment due to pregnancy. Now, the language, "due to pregnancy" calls for some interpretation. Does, "due to pregnancy," mean originated by pregnancy? That is, does it have a reference to the first cause of unemployment? Or, does, "due to pregnancy," have reference to employability? That is, does this provision have reference to the reason for the continuation of unemployment? To put the last question differently, does this provision mean that there should be disqualification from unemployment benefits only as long as the woman in question is partially or wholly unemployable due to pregnancy? Or, does it mean that once a woman leaves a particular job because she is pregnant she remains disqualified forever from getting compensation for that job loss even though she regains her strength and employability.

Well, it seems to me that the latter construction is not sensible. It is not the construction which is in keeping with the beneficent purposes of this Statute. In my mind such an interpretation seems to create a jarring disharmony with Section 2 of the Statute. Why should a woman be forever barred from employment benefits for a particular job loss because at one time she became unemployable due to pregnancy. This doesn't make sense to me. This is not social security, but its very antithesis, social insecurity.

This is to say that when a woman bears a child she should suffer a penalty not applied to persons who become disabled from employment due to poor health or injury or other physical reasons. This seems not only contrary to the expressed policy of the Statute, but contrary to any other basic notions of public policy and fair play. I have never heard of a legislator who is against motherhood, but it is suggested here that the entire Legislature of our State intended a meaning for this Statute which penalizes motherhood. This is too much for any elected public official to swallow.

If we construe the basic declaration of Section 29(d) in a manner consistent with Section 2 of this Statute, we have no reason to look further to the proviso. The proviso only comes into play in the event of disqualification. There is a disqualification from unemployment only for so long as the employee is partially or totally unemployable by reason of the pregnancy. I would suppose that this would include not only the period of gestation but also the period in which there is some physical aftermath or impairment by reason of the pregnancy and birth.

But, in the case, the evidence is undisputed that the woman became employable in June. The finding at the administrative level of the Commission, that this woman

was not ready and able to work in June is against the overwhelming weight of the evidence and without any support whatsoever in the record. The medical evidence shows that she was able to work in June. Therefore, at the time, in June, when she requested employment and it was denied her by the employer, she was unemployed under Section 48 and was not disqualified for benefits under Section 29(d).

For these reasons, the decision of the Appeal Board of the Commission should be reversed.

If any of you would like to file a brief, let me give the employer a period of fifteen days in which to file a memorandum. What I would appreciate more than an elaborate brief, Mr. Fritz, if you want to file a brief, would be a memorandum in which you state your legal propositions and the authorities for those propositions.

Mr. Fritz: I don't think that would be necessary, to file a brief. I wouldn't care to have you hold the case over that long.

The Court: If, Mr. Long, you think that I have gone frong; you shold have an opportunity to file a brief to tell me what the right path is. Mrs. Conway, if you think that I have reached the right result but for the wrong reasons, you can file a brief, if you desire.

Mrs. Conway: I have no desire to file a brief. I am very well satisfied.

Mr. Long: I will say, at this point, I will not file, that we will not file a brief.

The Court: If you are all sure that you will not file briefs, then we will consider the matter disposed of.

Claimant entered the employment of this employer on February 23, 1953 as a press operator. At a date prior to December 26, 1957, the claimant requested and was granted a leave of absence in connection with her pregnancy. The

leave was granted after a discussion of the matter between the claimant and the employer's general manager, and the discussion confirmed by a letter to the claimant wherein it was stated, "Your request for a leave of absence has been granted until September 29, 1958. It is understood you will advise the company your date of return to regular employment before your leave has expired."

The claimant's child was born on April 30, 1958 and on June 9th of that year the claimant called the employer to inform him that she had her doctor's permission and was returning to work. Claimant was told by the employer that her leave of absence extended to September 29 and that she could not be reinstated until such date.

The claimant contended that the general manager had led her to believe at their meeting that if she was well before the date of expiration of the leave she could at that time return to work if she had a permission slip from her doctor. For this reason the claimant contended further that she interpreted the letter to mean that she only needed to inform the employer she was well again and her leave of absence would be concluded.

OKLAHOMA ATTORNEY GENERAL OPINION

[¶ 8144] Pregnancy disqualification violates equal protection clause of the U. S. Constitution.—Atty. Gen. Op. No. 72-211, 11/22/72.

The Attorney General has received your request for an opinion wherein you, in effect, ask:

> "Is 40 O. S. 1971, § 216(g), pertaining to the disqualification of unemployment benefits to women 6 weeks before and 6 weeks after giving birth to a child, constitutional?"

Title 40 O. S. 1971, § 216 specifically states that:

> "An individual shall be disqualified for benefits:
> ". . .
> "(g) For the six (6) weeks before the expected date of the birth of a child to such individual and continuing for six (6) weeks after the date of the actual birth of said child."

It is further apparent that the Oklahoma Act must be construed and administered in accordance with the policy and purposes of the federal program and federal regulations under the Social Security Act (42 U. S. C. A. § 501, et seq.)

• • •

It is clear, therefore, that the Oklahoma Legislature is not unrestrained in the regulations it can impose upon the program, since the program must ultimately conform to federal standards.

In *Nash* v. *Florida Industrial Commission,* 389 U. S. 235, 88 S. Ct. 362, 19 L. Ed. 2d 438 (1967), Mr. Justice Black, speaking for a unanimous Supreme Court, said in part:

> "It appears obvious to us that this financial burden which Florida imposes will impede resort to the Act and thwart congressional reliance on individual action. A national system for the implementation of this country's labor policies is not so dependent on state law. *Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan. . . .*

The section involved denies benefits to a pregnant female for a 12 week period. Such exceptions to eligibility would

generally be valid, provided they did not conflict with the congressional purpose in enacting the program, other federal law, or the Constitution.

Title VII of the 1964 Civil Rights Act [42 U. S. C. §2000e-2(a)] provides in part:

• • •

It thus becomes clear that the Legislative Branch of the Federal Government has expressed strenuous objection to laws which discriminate against women solely on the basis of sex.

The Executive Branch of the Federal Government has also acted. The Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, which were last amended and reissued on March 30, 1972 (37 F. R. 6835), effective on April 5, 1972, are codified as Title 29 C. F. R., Chapter XIV, Part 1604, Sections 1604.1 to 1604.10, as amended. The pertinent sections to the issue at hand read as follows:

• • •

The section in question, therefore, is of dubious validity for the reasons set out above and in light of the 1964 Civil Rights Act. The final blow to the validity of this statute, however, most certainly comes from a fundamental principle of our laws as old as the Constitution itself—the equal protection of the laws.

• • •

A provision in a state's unemployment compensation law subjecting pregnant and post-pregnant women to more stringent eligibility requirements than are applied to other temporarily disabled persons seems patently discriminatory, and thus prohibited by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the

United States. Such a statute discriminates between otherwise similarly situated classes on the basis of a physical condition unique to one sex. If that discrimination cannot be reasonably justified, then it is contrary to the law and public policy of the land. It is equally clear that a statute which discriminates on the basis of pregnancy is discriminating on the basis of sex.

• • •

The criteria normally applied (availability for work) is clearly more than adequate for the termination of benefits for *all* persons under the program about to undergo a temporary disability, whether it be pregnancy or otherwise.

It is, therefore, the opinion of the Attorney General that your question be answered in the negative. Section 215(g) of Title 40 of the Oklahoma Statutes is based exclusively on a physical condition unique to one sex, female, and is prohibited by Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CLAIM OF *MONROE* v. *MESC, EMPLOYER*
STATE OF MICHIGAN
EMPLOYMENT SECURITY APPEAL BOARD

In the Matter of the Claim of	
KATHLEEN J. MONROE,	Appeal Docket
Claimant	No. B75-6555-48846
MICHIGAN EMPLOYMENT	Social Security
SECURITY COMMISSION,	No. 372-52-5396
Employer	

DECISION OF APPEAL BOARD

This matter is before the Appeal Board for disposition pursuant to the order issued on December 12, 1975 by the

Honorable Charles W. Joiner, Federal District Judge, in the case of *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, et al.,* vs. *S. Martin Taylor, Director, and the Michigan Employment Security Commission, et al.,* Civil Action No. 4-70066, which states as follows:

• • •

It is, therefore, held that the claimant shall be entitled to benefits pursuant to said order.

It is further held that the claimant is able and available for the period from June 20, 1971 through July 31, 1971 and the weekly benefit entitlement during said period is left for Commission determination.

/s/ WILLIAM J. McBREARTY,
Chairman
/s/ GERARD P. PEPLOWSKI,
Member

Dated and mailed at
Detroit, Michigan on
June 25, 1976

CLAIM OF CONLEY AND HAMILL MFG.
DIV. OF FIRESTONE, EMPLOYER*
Department of Labor
MICHIGAN EMPLOYMENT SECURITY
COMMISSION
REFREE SECTION
DECISION

In the Matter of the Claim of
Karen A. Conley
1700 W. Atwater Rd.
Bad Axe, Mich. 48413
S.S. No. 372-42-7036

Employer Involved
Hamill Manufacturing Company
(Div. of Firestone Tire & Rubber Co.)
334 East Soper Road
Bad Axe, Mich. 48413
Appeal No. B75-1449 et al
(See Attached List)

Referee: W. Raymond Adkins
Employer appealed Redetermination of: Janary 14, 1975 on January 17, 1975
Hearing(s) held on: March 19, 1975

FINDINGS OF FACTS AND REASONS

• • •

This matter came on for hearing before this Referee in Detroit on March the 19th, 1975, at a proceding attended by the following parties:

Dianne B. Fraser, Attorney, from Dykema, Gossett, Spencer, Goodnow & Trigg, representing Employer.

*This claim was heard due to UAW v. Taylor.

Angelo Bommarito, Compensation Representative, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW, representing Claimant Karen A. Conley and all other Claimants on attached list.

A protracted hearing was held in this matter, at which extensive oral argument was offered for the record by both counsel for the employer and by the claimant's duly authorized representative.

We make the following findings of fact:

After a claim for benefits was filed by the claimant and investigated at some length by the local branch office, a determination was formally made and formally issued under date of November the 15th, 1974, on the face of which substantial, specific adjudications were set forth concerning the claimant's eligibility for benefits for various periods, and the face of the mentioned determination also set forth, in clear and unconfused printed matter on the form, instructions concerning the character of the document and the nature of statutorially established protest rights.

The employer did not attempt to seek reconsideration of this matter until it filed with the local branch office on December the 20th, 1974 • • •

The employer, in receipt of a specific adjudication bearing specific instructions concerning statutorially established protest rights, neither complied with the instructions and filed a timely protest to the adjudication involved, nor sought, after receipt of the adjudication, any advice or cousel from the local branch office concerning either the contents of the adjudication or the instructions printed thereon concerning rights of protest.

• • •

DECISION

The Denial of Request for Reconsideration issued in this matter by the Commission to the employer on January the 14th, 1975 is hereby affirmed.

/s/ W. RAYMOND ADKINS,
Referee

Mailed at Detroit, Michigan, March 29, 1975

• • •

TENNESSEE ATTORNEY GENERAL OPINION

Opinion No. 2 (June 21, 1976)

Regarding the constitutionality of the pregnancy provisions of T. C. A. § 50-1324 (A) which establish a conclusive presumption of incapacity for twenty-one days after the date of birth, and ask that our opinion be rendered in the light of the recent United States Supreme Court decision in the case of *Mary Ann Turner* v. *Department of Employment Security and Board of Review of the Industrial Commission of Utah*, — U. S. — (1975), and the official position of the United Department of Labor in that regard as promulgated in Unemployment Insurance Program Letters Nos. 1-76 and 1097.

It is the opinion of this office that the conclusive presumption of incapacity for twenty-one days after the date of birth contained in T. C. A. § 50-1324(A) is unconstitutional in light of the *Turner* decision.

Further, it is the opinion of this office that the court's holding in *Turner* that "the Fourteenth Amendment requires that unemployment boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake" would be substantially complied with if, when determining "availability for work", the standard to be used for pregnant women would be the standard currently used for those who are "sick or disabled" as prescribed in T. C. A. § 50-1324(A).

PORTION OF PAGE 20 OF FIRESTONE'S BRIEF TO THE COURT OF APPEALS

• • •

***Firestone does *not* ask—and has not asked—that the MESC seek refunds from claimants to whom benefits have already been paid in the event that Firestone prevails on the merits.[8] Since the MESC's actions in this case have caused the erroneous payments to claimants, Firestone has suggested that, if Firestone ultimately prevails on the merits, the Court below (or the MESC on its own initiative) should act so that refunds will not be sought by the MESC.

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[8] In proceedings before the MESC, Firestone is asking that its account be credited by the amounts wrongfully paid to pregnant claimants, these amounts to be made up by all employers in Michigan.

Supreme Court, U. S.
FILED
APR 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1147

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v.

S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, AND ALEX FULLER, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

REPLY OF PETITIONER TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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March 30, 1978

CASILLAS PRESS, INC.—1717 K Street, N.W.—Washington, D.C.—223-1220

IN THE

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OCTOBER TERM, 1977

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Respondents.

REPLY OF PETITIONER TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Briefs of the Respondents, Michigan Employment Security Commission (the "State") and International Union, UAW ("UAW"), confirm the importance of this Court's consideration of the issues raised by the Petition. The concessions of the State and the UAW, moreover, establish that if this Court does not grant the Petition, it should summarily reverse the judgment below.

I. THE ARGUMENTS OF THE RESPONDENTS DEMONSTRATE THE CRITICAL ISSUES WHICH REQUIRE THIS COURT'S CONSIDERATION.

The discussion by the State and the UAW of the Title VII and *Nash* issues raised at pages 12-20 of the Petition demonstrate clearly and convincingly both the importance of those issues and the need for this Court to resolve them.

The UAW and the State argue that mandatory pregnancy leave violates Title VII (State Brief, pp. 17-19; UAW Brief, pp. 25-26), but in doing so only demonstrate the extent to which there appears to be uncertainty about this Court's decisions. Petitioner believes these decisions establish that Title VII does not preclude mandatory pregnancy leave, see Petition, pp. 16-18. Respondents, however, assert that Title VII does prohibit such leave. The UAW assumes that the decision below does not conflict with *Gilbert* and *Satty*, as demonstrated in the Petition, but that is in fact one of the important issues posed by this case.[1]

With respect to the *Nash* issue, Petitioner respectfully requests the Court to read the State's analysis of that issue at pages 14-16, 20-21 of its Brief concurrently with the Petition's consideration of *Nash* at pages 18-20. A reading of these two discussions of *Nash* is itself an eloquent demonstration of the need for this Court to address the *Nash* issue raised by this case.

The State asserts that the denial of unemployment compensation is "punishment for activity which an act of Congress protects against discrimination." (State Brief page 20). What activity? What act of Congress? And what

[1]The MESC suggests that *Aiello*, cited by Petitioner, is "irrelevant to this case." State Brief, p. 19. But, as noted in the Petition, this Court placed considerable reliance on that case in its *Gilbert* opinion.

punishment? MESA Section 48 provides that no unemployment compensation will be paid to any of a broad class of persons on leave and never mentions the term "pregnancy" or "woman." There is no indication (or allegation) that the Michigan legislature enacted MESA Section 48 in order to punish women for becoming pregnant.

The State asserts that the denial of unemployment compensation "encouraged" employers to provide pregnancy leaves. But there has been no trial to assess the validity of that allegation. In any event, as the UAW recognizes, Petitioner eliminated its mandatory leave policy when the EEOC (erroneously) declared that pregnancy leave violated Title VII, even though Michigan at that time was not paying unemployment compensation to the pregnant women placed on leave. This demonstrated (as is in any event self-evident) that employers would be deterred more by the possibility of backpay actions (if pregnancy leaves were unlawful) than they would be encouraged to place women on leave by the fact that the state would not pay unemployment compensation.

If, as the State asserts, the Courts below applied *Nash* in these circumstances, they extended it improperly far. This Court should consider the issue raised by such an extension: whether, *if* mandatory pregnancy leave violates federal law, the State is preempted from applying to pregnant women a sexually neutral provision that unemployment compensation funds be spent for people who are only temporarily on leave and can go back to work when their leave has ended.

II. THE ASSERTIONS OF THE RESPONDENTS MAKE CLEAR THE NEED FOR SUMMARY REVERSAL OF THE DECISION BELOW.

The Petition established that the proceedings below, for a number of reasons, departed so far from the accepted course of judicial proceedings and so violated Petitioner's Constitutional rights that this Court should grant the Petition and summarily reverse the decision below. (Petition, pp. 22-25) Now, the State and UAW have made assertions that establish clearly that the Consent Order in *UAW v. Taylor* was based upon Constitutional grounds and thus beyond the jurisdiction of the single judge who entered it. These assertions demonstrate even further the need for summary reversal.

It has never been possible for Petitioner to pin the other parties (or the District Court) down as to just what principle of "Federal law" MESA Section 48 was supposed to have violated or contravened.[2] In denying Petitioner's Motion to Intervene in *UAW v. Taylor*, the District Court cited only

[2]Both the UAW and the State defend the decision below by citing whatever Federal law seems to suit their purpose at the moment. When they are trying to defuse Petitioner's Title VII arguments, they cite this Court's Constitutional decisions in *Turner* and *LaFleur*. At other times they seem to find it expedient to argue that Title VII was the *ratio decidendi* of the Consent Order. See, *e.g.*, UAW Brief, p. 33, the second paragraph, footnote 44.

Furthermore, when the UAW considers the possible non-constitutional basis of the Consent Order, it cannot decide whether or not the Consent Order was based upon the application of the *Nash* doctrine. Compare UAW Brief, p. 27, saying this was not a *Nash* case, with the UAW Brief, p. 21, citing *Nash* and asserting the decisional basis was that the State "impeded certain Federal laws." Only this balancing act permits the UAW to say that the Consent Order is not contrary to *Vick v. Texas Employment Commission*, 514 F.2d 734, *reh. denied*, 520 F.2d 944 (5th Cir. 1975), because based on *Nash*, and also that the Consent Order is not an extension of *Nash* because, says the UAW, it is *not* based on *Nash*. Compare UAW Brief, p. 23 and p. 27.

one authority on the merits of the Consent Order: this Court's Constitutional decision in *Turner v. Department of Employment Security of Utah*, 423 U.S. 44 (1975). The District Court held that in light of *Turner* ". . . the Court is convinced of its correctness of its prior orders in this case."

Because *Turner* was a Constitutional decision and because the Consent Order in *UAW v. Taylor* was entered by a single judge and not by a three-judge court, as then required for Constitutional injunctions against the enforcement of state statutes, Petitioner complained in *Firestone v. Taylor* that the Consent Order was beyond the jurisdiction and the power of a single judge and accordingly void. See 28 U.S.C. §2281 (1970 ed.).

The Sixth Circuit, however, held that the District Court had not based the Consent Order upon the Constitution, but upon Title VII. (See Appendix to Petition, p. 5a). And the Petition, taking that as the operative statement of the legal issues in this case, urged that the application of Title VII here raised a number of important issues that require this Court's consideration.

But now the UAW and the State contend that it was Constitutional questions that were critical to the entering of the Consent Order. Each agrees that the Consent Order was, in the words of the UAW, "a direct result of this Court's decision in *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632 (1974)," (UAW Brief, p. 16; see also State Brief, p. 4). *LaFleur* was a purely Constitutional decision. In addition, both the State and the UAW argue that *Turner* is dispositive and that for this reason this Court should deny the Petition. Indeed, the UAW goes so far as to assert that "Firestone's post-*Turner* tenacity is not admirable." See UAW Brief, pp. 21-22, including n. 24; State Brief p. 12. *Turner* was also a purely Constitutional decision.

Thus, the assertions of the parties to the Consent Order now inform us that the elusive "Federal law" which was the

basis of the Consent Order was the Constitution. If that is so, the decision below is clearly wrong in that it upholds a single judge's injunction against the enforcement of a state statute for Constitutional (Fourteenth Amendment) reasons.[3]

Even if this Court were not to grant the Petition for the purpose of considering the issues raised therein, it should grant the Petition and summarily reverse the decision below as beyond the jurisdiction of the courts below and otherwise totally erroneous (as described in the Petition). At a minimum, the action should be remanded to the Sixth Circuit for a complete and appropriate determination of the *ratio decidendi* of the Consent Order.

III. THE UAW BRIEF IS EXTRANEOUS AND MISLEADING.

Virtually all the UAW Brief is extraneous and misleading. It is also verbose and disjointed. As such, it would properly be subject to a motion to strike. Petitioner, however, will not ask this Court to take the time to consider such a motion.

The bulk of the UAW Brief consists of extraneous factual assertions and legal argument concerning an issue not before this Court: namely, whether Petitioner's Motion to Intervene in *UAW v. Taylor* was properly denied under Fed. R. Civ. Pro. 24. While Petitioner believes that the Courts below erred in denying intervention, Petitioner has not asked this Court to consider the intervention issue, and

[3]As Petitioner argued to the Courts below, there is no valid Constitutional basis for the Consent Order. See, *e.g.*, *Geduldig v. Aiello*, 417 U.S. 484 (1974). Since any Constitutional basis for the Consent Order renders it void on jurisdictional grounds, this Court could not reach the Constitutional issues in the present posture of these proceedings; and, Petitioner accordingly does not here address them.

the UAW's extensive factual and legal assertions directed at that question are simply beside the point.[4]

The frequent assertions in the UAW's Brief that Petitioner (and by inference, its counsel) are guilty of making false and misleading statements to this Court are untrue and do not belong in a submission made to this Court. We do not wish to burden the Court with a point-by-point refutation. But to indicate the tenor of the UAW's false accusations and to clarify the Record on points which relate to the issues raised by the Petition a few examples of the false accusations will suffice.

The UAW accuses the Petitioner of misleading this Court by stating that the State's counsel conceded that it did not represent employers' interest in *UAW v. Taylor*. (UAW Brief, p. 14) But the statements made to the District Court by the State's counsel, as quoted by the UAW itself and by the State, quite clearly show that the MESC's counsel was not in fact representing employers in the suit.[5]

The UAW accuses Petitioner of being "MISLEADING" in stating that the Consent Order was totally silent with

[4]Further, both the UAW and the State assert that Petitioner is bound by *res judicata* or collateral estoppel because it was a party to a state court case in which the state court held that it was bound by the Federal Court's determination of Federal law in the *UAW v. Taylor* Consent Order. This is a bizarre argument. The state court decision was entered on August 30, 1974, after the Consent Order in *UAW v. Taylor* was entered. As the UAW itself concedes (Brief, p. 18), the state court order "was expressly based upon" the Consent Order. The Federal law issues were not litigated in the state case — how could the state court have "reversed" a Federal Court's determination of Federal law? There can clearly be no *res judicata* or collateral estoppel.

[5]The State's view of its role is demonstrated by its Brief here. That Brief seems intent on attacking the State legislation and the acts of the State agency. It is at times difficult to remember that this is a brief filed on behalf of the State. It is obvious that no party in this case has defended the legality of the statute at issue or opposed the legality of the judgment sought by the claimants.

respect to what Federal law it was decided under. (UAW Brief, p. 6) But that is a fact. Indeed it is confirmed by the UAW's recitation that the Consent Order was "based upon" the Complaint and Motion for Summary Judgment (one assumes Orders are based on laws, not pleadings) and that the Complaint "set forth several Federal laws which were impeded or violated. . . ." Unless Petitioner's counsel are deaf, the Consent Order remains silent as to what Federal law it was based on — a silence that is not cured by the noise of the claimant's pleadings or Respondents' Briefs here.

At page 5 of its Brief, the UAW asserts that the plaintiffs in *UAW v. Taylor* complained only of a state "practice, set forth in an informal, internal MESC manual and not even promulgated in any formal MESC regulation." To the contrary, what was at issue in *UAW v. Taylor* was not some informal internal administrative interpretation: the Consent Order enjoined the application of the precise words of a duly enacted state statute.

Yet another example of the UAW's misleading statements is the UAW's assertions that the MESC "voluntarily" ceased applying MESA Section 48 to women on pregnancy leave. (UAW Brief, pp. 20, 24) The Record is clear that the MESC took this action only after it had agreed to the *UAW v. Taylor* Consent Order, albeit before that Order was formally entered by the Court. The State's actions are pursuant to that Order. Why else was it entered? Moreover, if the State were acting "voluntarily," then the judgments below were beyond the jurisdiction of the courts (since there was no case or controversy) and the judgment below should be summarily reversed.

CONCLUSION

For the reasons stated in the Petition and in this Reply, the Petition for a Writ of Certiorari should be granted, or the judgment below, on Respondents' own arguments, should be summarily reversed.

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